134-515

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 804. ~~463~~ 215

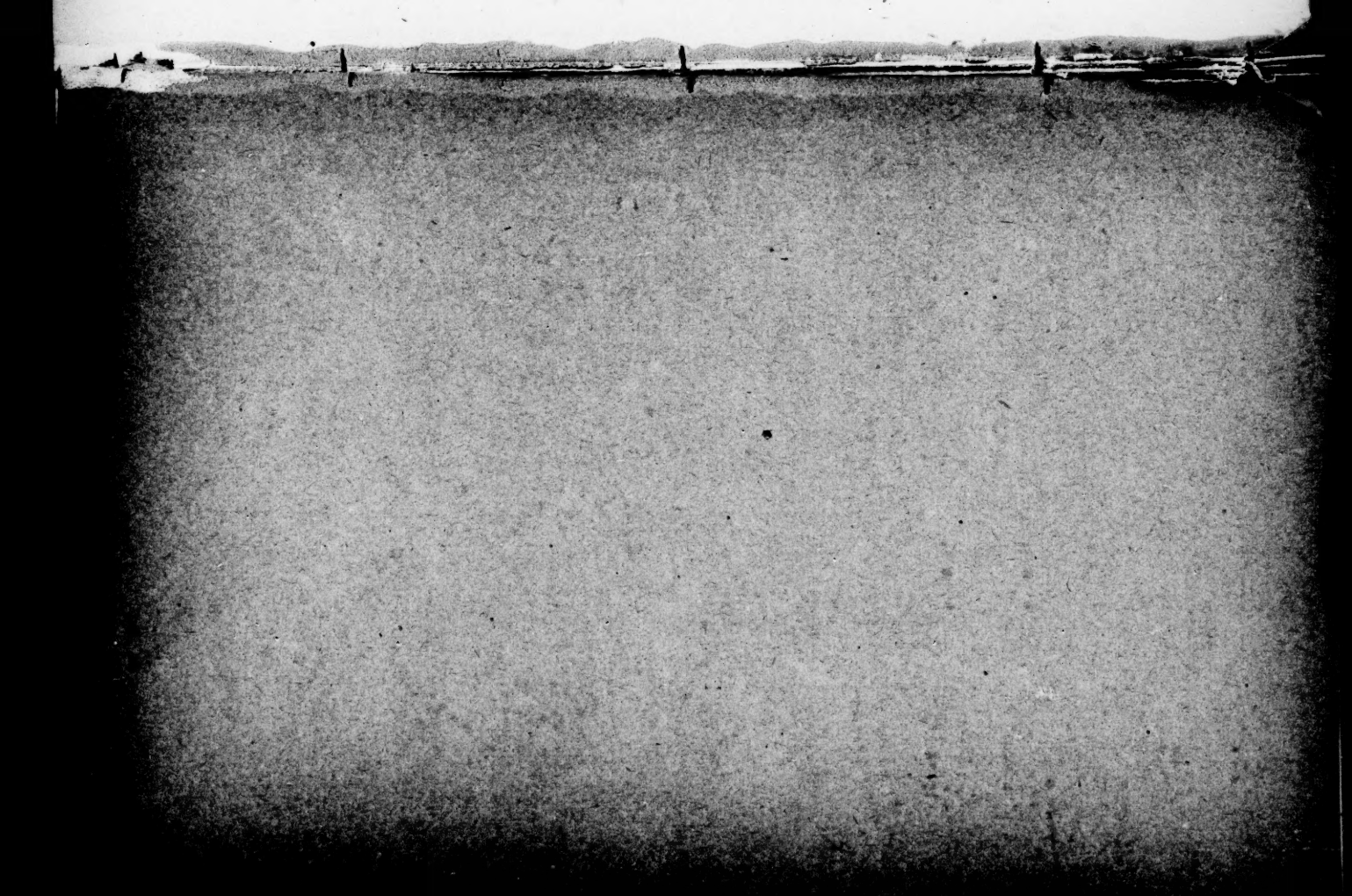
BRITTON A. HILL, STOCKHOLDER IN THE EXCELSIOR INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE MERCHANTS MUTUAL INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED OCTOBER 18, 1886.



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INDEX.

	Original.	Print.
Writ of error	*a*	1
Citation	*c*	2
Proof of service of citation	*d*	2
Caption	1	2
Transcript from St. Louis court of appeals	1	2
Transcript from circuit court of city of St. Louis	1	2
Notice of motion for execution	1	3
Motion for execution	1	3
Amendment to petition	2	3
Submission	2	4
Judgment	3	4
Order overruling motion for a new trial	3	5
Order as to bill of exceptions	3	5
Order allowing appeal	3	5
Bill of exceptions	4	5
Testimony of Jeremiah F. Conroy	4	5
Execution	5	6
Charter of the Excelsior Ins. Co.	6	6
Notes of Hill & Horner, July 20, 1886	7	6
Defendant's requests	9	9
Testimony of Britton A. Hill	9	11
Motion for a new trial	10	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 22, 1887.

	Original.	Print.
Affidavit for appeal	11	11
Bond for appeal	11	12
Clerk's certificate	12	12
Assignment of errors	12	13
Joinder in error	14	13
Judgment	14	14
Opinion	14	14
Order allowing appeal	35	24
Prayer for appeal	36	24
Affidavit for appeal	36	24
Bond for appeal	37	25
Clerk's certificate	38	25
Assignment of errors	39	26
Joinder in error	40	26
Order for continuance	41	26
Submission	41	27
Judgment	42	27
Opinion	43	27
Order allowing writ of error, &c.	47	30
Bond	48	30
Clerk's certificate	50	32

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, at the October term, 1885, thereof, between The Merchants' Mutual Insurance Company, respondent, and Britton A. Hill, stockholder in Excelsior Insurance Company, appellant, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said U. S. Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said U. S. Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of November, in the year of our Lord one thousand eight hundred and eighty-five.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, eastern division, dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri.

A good and sufficient bond having been presented and filed by the plaintiff in error, the same is approved, and it is ordered that a supersedeas be granted herein, & this writ is allowed by—

JNO. W. HENRY,
Chief Justice Supreme Court of Missouri.

b *Return to Writ.*

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the — Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said — court, at the city of Jefferson, this — day of ——, A. D. 187–.

—— ——, *Clerk.*

[Endorsed:] No. —. United States circuit court, western district of Missouri. Merchants' Mut. Ins. Co. *vs.* Britton A. Hill, stockholder Excelsior Ins. Co. Writ of error to the supreme court of the State of Missouri. Returned and filed — day of ——, 187–. —— ——, clerk. [In pencil:] Nov. 6th, '85.

c The United States of America to The Merchants' Mutual Insurance Company, respondent, Greeting.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri, wherein Britton A. Hill, stockholder in Excelsior Insurance Company, appellant, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf; and that the said Hill having filed a good and sufficient bond, which has been approved, a supersedeas has been awarded to him upon said judgment.

Witness the Honorable John W. Henry, chief justice of the supreme court of the State of Missouri, this second day of November, in the year of our Lord one thousand eight hundred and eighty-five.

JNO. W. HENRY,
Chief Justice of the Supreme Court of Missouri.

d [Endorsed:] United States circuit court, western district of Missouri. Merchants' Mut. Ins. Co., defendant in error, *ads.* Britton A. Hill, stockholder Excelsior Ins. Co., plaintiff in error. Citation. Filed ———, 1885. ——— ——, clerk. [In pencil:] Nov. 6th, '85.

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

I hereby acknowledge due service of the within citation this seventh day of November, A. D. 1885.

PATTISON & CRANE,
Attorneys for Defendant in Error.

1 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 30th day of September, 1882, there was filed in the office of the clerk of the supreme court of Missouri a transcript from the St. Louis court of appeals, which is in the words and figures following, to wit:

STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the 17th day of September, A. D., 1881, there was filed in the office of the clerk of the

St. Louis court of appeals a transcript from the circuit court, city of St. Louis, which is in the words and figures following, to wit:

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Be it remembered that on the seventeenth day of December, in the year of our Lord eighteen hundred and seventy-nine, there was filed in the office of the clerk of the circuit court, city of St. Louis, a notice of motion for execution, a motion for execution, and return of service, which are, respectively, in words and figures following, namely:

Notice of Motion.

To Britton A. Hill, Esq.:

You will take notice that on Wednesday, the 17th day of December, 1879, I will file in the circuit court of the city of St. Louis, Missouri, a motion for execution against you as a stockholder of the Excelsior Insurance Company, and that as soon thereafter as counsel can be heard I shall call up said motion for action thereon by the court, when and where you may attend if you see fit. A copy of said motion is hereto annexed.

EVERETT W. PATTISON,
Att'y for Merchants' Mutual Insurance Company, Plaintiff.

In Circuit Court, City of St. Louis.

THE MERCHANTS' INSURANCE COMPANY, Plaintiff, }
vs. } No. 30902.
THE EXCELSIOR INSURANCE COMPANY, Defendant. }

Now, at this day, comes the above-named plaintiff and states that an execution for five thousand two hundred and fifty-
2 six $\frac{27}{100}$ dollars has been issued in the above-entitled cause out of the clerk's office of this court against the property and effects of the defendant in said cause, and that there could not be found anything whereon to levy said execution, and that at the time of the contracting by defendant of the debt on which judgment in said cause was rendered, as well as at the time said judgment was rendered and said execution was issued as aforesaid, Britton A. Hill was the owner and holder of thirty-seven shares of the capital stock of said defendant, of the par value of one hundred dollars per share; that said shares were never fully paid up, but that twenty per cent. and no more has been paid thereon.

Wherefore plaintiff prays that execution may issue against the said Hill for the sum of two thousand nine hundred and sixty dollars, being the amount so due by him on the shares aforesaid, or for sufficient to satisfy said execution.

EVERETT W. PATTISON,
Att'y for Pl'ff.

Served this notice in the city of St. Louis on the 6th day of December, 1879, by delivering a copy of the same to Britton A. Hill, the within-named —.

JOHN FINN, *Sheriff*,
By W. N. BELL, *Dep.*

And afterwards the following proceedings were had, to wit:

Motion Amended.

February Term.

MONDAY, *March 8th*, 1880.

Now, at this day, on motion of the plaintiff, by its attorney, and by leave of court, said plaintiff amends its petition herein by inserting the word "Mutual" between the words "Merchants" and "Insurance" wherever they occur, so that the name of the plaintiff shall read "Merchants' Mutual Insurance Company,"

October Term, 1880.

THE MERCHANTS' MUTUAL INSURANCE COMPANY
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTON A. HILL, Stockholder. } 52086.

WEDNESDAY, *November 10th*, 1880.

Now, at this day, come the plaintiff and Britton A. Hill, stockholder, by their respective attorneys, and, this cause coming on to be heard, the same is submitted to the court upon the pleadings and proofs adduced; and the court, having heard the evidence herein, takes this cause under advisement.

3

Judgment.

December Term, 1880.

THE MERCHANTS' MUTUAL INSURANCE COMPANY
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTON A. HILL, Stockholder. } 52086.

MONDAY, *December 13th*, 1880.

And now, at this day, the court, being fully advised of and concerning the premises in this cause heretofore submitted to the court, finds that Britton A. Hill was and is a stockholder in the Excelsior Insurance Company, owning thirty-seven shares of stock, of the par value of one hundred dollars each, and that the unpaid balance on said shares is two thousand one hundred and twenty-seven dollars and fifty cents, and that said Britton A. Hill is liable to the execution of plaintiff in said amount. It is, therefore, ordered by the court that the motion for — of plaintiff for execution be sustained, and that execution issue herein in favor of the Merchants' Mutual In-

surance Company, said plaintiff, and against said Britton A. Hill, for said sum of two thousand one hundred and twenty-seven dollars and fifty cents, together with the costs of this proceeding under the plaintiff's motion for execution herein.

Motion for a New Trial Filed.

WEDNESDAY, *December 15th*, 1880.

And afterwards, at the February term, 1881, of said court, the following further proceedings were had in this cause, to wit:

Motion for New Trial Filed & Overruled.

MONDAY, *February 7th*, 1881.

Now, at this day, the court, being fully advised of and concerning the motion heretofore submitted herein for a new trial, doth order that said motion be overruled.

Bill of Ex. Filed.

WEDNESDAY, *March 2nd*, 1881.

Now, at this day, comes Britton A. Hill, by his attorney, and presents a bill of exceptions, which bill is allowed, signed, and sealed by the court, filed herein, and made a part of the record in this cause.

Aff. & Bond Filed.

TUESDAY, *March 15th*, 1881.

Now, at this day, comes Britton A. Hill, by his attorney, and files herein an affidavit and bond for appeal, which bond is
4 approved by the court, and on motion of said Britton A. Hill, by attorney, it is ordered by the court that an appeal to the St. Louis court of appeals be granted him from the judgment or decision herein awarding execution against him; which said bill of exceptions, affidavit, and bond are in words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court, City of St. Louis, State of Missouri.

THE MERCHANTS' MUTUAL INSURANCE CO., Plaintiff,
vs.
BRITTON A. HILL, Defendant.

Be it remembered that on the 13th day of December, 1880, the motion filed by the plaintiff in this behalf against the defendant, as stockholder in the Excelsior Insurance Company, came on for hearing, and to support said motion the plaintiff offered testimony in substance as follows:

Testimony of J. F. Conroy.

Jeremiah F. Conroy was sworn as a witness, and testified that he was one of the attorneys of the Excelsior Insurance Co., and had

been since 1871 or 1872; that the company ceased in 1872 to take risks and then reinsured; that the defendant was a stockholder in the Excelsior Insurance Co., having subscribed originally for sixty-four shares, of the par value or one hundred dollars each, and had given notes for the same, upon which he had made payments at various times, as herein explained—that is to say, he paid twenty-five per cent. cash on subscription and gave notes as follows: Four notes, dated July 20, 1866, each for $750, payable on demand to the order of the Excelsior Insurance Co., and one note, dated July 11, 1866, for $1,800, payable on demand to the order of the same company. On account of this stock, and credited on these notes, defendant paid as follows: Oct. 30, 1868, 13½ per cent., or $6.40, or ten per cent. on the face of the subscription; Oct. 20, 1870, 2½ per cent. on the face of the subscription, or $160.00.

The testimony tended to show that on January 20, 1871, the capital stock of the Excelsior Insurance Co. was reduced so that defendant after said reduction became liable on thirty-seven shares in place of sixty-four shares; that after such reduction of the capital stock of said company the defendant paid, Oct. 16, 1871, ten per cent. cash on thirty-seven shares of said capital stock, or $370.00. On February 27, 1872, defendant paid a call of twenty per cent. on said thirty-seven shares of stock, or seven hundred and forty dollars ($740).

Witness testified further that after the Excelsior Insurance Co. ceased to do business, in 1872, further assessments were made against defendant on this stock subscription, and that witness called on defendant to pay the same, but was told by him that the company owed him more for professional services than he owed the company for his stock.

The testimony also tended to show that the reduction was such that the capital stock of the company was reduced to one hundred thousand dollars ($100,000), with 12½ per cent. paid up, and that the subscriptions of stock were equalized on this bases, which left defendant thirty-seven shares.

Plaintiff also offered in evidence execution No. —, to ——, term 18—, of the circuit court, wherein the plaintiff in this case was plaintiff and the Excelsior Insurance Co. was defendant.

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

Whereas Merchants' Mutual Insurance Company, on the 4th day of May, in the year of our Lord one thousand eight hundred and seventy-eight, at our circuit court, recovered against Excelsior Insurance Company the sum of twenty-six hundred and forty-three dollars and eighty-eight cents debt, together with seventy-three dollars and sixty cents for costs and charges in that suit expended; and whereas, on the 7th day of October, 1878, plaintiff remitted the sum of four hundred and sixty-one dollars and 21 cents, these are, therefore, again to command you that of the goods and chattels and real estate of the said Excelsior Insurance Company you cause to be made the debts, less remittitur, with 8% per annum, and costs, and

that you have the same before the judges of said court on the first Monday of April next, to satisfy the debt, interest, and costs
6 aforesaid, and that you certify how you have executed this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof herewith affixed at office, in the city of St. Louis, this 23rd day of January, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.] CHARLES F. VOGEL, *Clerk.*

Endorsed: No. 32. Circuit court, city of St. Louis. 1879. Merchants' Mutual Insurance Company *vs.* Excelsior Insurance Co. *Aliae fi. fa.* Judgment May 4th, 1878.

Debt		$5,643 88
Remittitur		461 21
8% interest.		$5,182 67
Clerk Vogel	$1 00	
Plaintiffs	71 60	
		72 60
		$5,255 27

No. 30902. E. W. Pattison, for pl'ff.

On the 5th day of Febr'y, 1879, in the city of St. Louis, I demanded the names of the stockholders in Excelsior Insurance Co. from Donovan and Conroy, att'ys, and on the 15th day of Febr'y, 1879, in said city, I demanded from A. K. Northrup the names of the stockholders in said insurance Co., and all of said parties declined and refused to give the names of said stockholders to me. No goods, chattels, or real estate found in the city of St. Louis belonging to the defendant whereon to levy this writ and make the debt and costs or any part thereof.

JOHN FINN, *Sheriff,*
By JOS. GREENWALD, *Deputy.*

Also the charter of the Excelsior Insurance Company, dated Feb. 9, 1859, and act to incorporate the Excelsior Insurance Company.

Charter Excelsior Ins. Co.

Be it enacted by the General Assembly of the State of Missouri as follows:

S. 1. That an insurance company be and is hereby established in the city of St. Louis, to be known by the name and style of the "Excelsior Insurance Company," the stockholders of which are hereby declared a body corporate and politic, with the same amount of capital stock and period of existence and the same rights, privileges, and restrictions as were conferred upon the "Wash-
7 ington Insurance Company" of St. Louis by an act of the General Assembly of the State of Missouri, approved March the third (3), eighteen hundred and fifty-seven (1857), with the ex-

ception of so much of section eight (8) of said act as declares the same a public act and exempts said corporation from the operation of section eighteen (18) of article first (1st) of the act entitled "An act concerning corporations," approved November the twenty-third (23rd), eighteen hundred and fifty-five (1855).

S. 2. James H. Lewis, Henry L. Patterson, Thomas Stern, Morris Collins, James G. Brown, and John C. Porter or any three of them, or such person or persons as they may appoint, are hereby constituted commissioners to open books for subscription to the capital stock, in the same manner as is prescribed in the charter of said Washington Company. This act to take effect from and after its passage.

Approved February 9, 1859.

Also the notes made by the defendant to the Excelsior Insurance Company, and herein referred to; to which defendant objected on the ground that they were not competent or relevant evidence, which objection was overruled, and defendant then and there duly excepted.

No. 12 A. ST. LOUIS, *July 20th*, 1866.

On demand we, jointly and severally, Britton A. Hill, as principal, and W. H. H. Horner, as security, promise to pay to the order of the Excelsior Insurance Company of St. Louis seven hundred and fifty dollars for value received, negotiable and payable without defalcation or discount.

$750. BRITON A. HILL.
W. H. W. HORNER.

Endorsed: 1868, Oct. 30. Call of Aug. 31, 1868, paid $100. R. S. Elliott, sec'y. 2½ % call of Sept. 19, '70, p'd $25.00. Call of Oct. 16, 1871, for 10 %, paid 60. Call of Febr'y 27, for 20 %, paid by note & cash.

No. 13 A. ST. LOUIS, *July 20th*, 1866.

On demand we, jointly and severally, Britton A. Hill, as principal, and W. H. W. Horner, as security, promise to pay to the order of the Excelsior Insurance Company of St. Louis seven hundred and fifty dollars for value received, negotiable and payable without defalcation or discount.

$750. BRITTON A. HILL.
8 W. H. W. HORNER.

Endorsed: 1868, Oct. 20. Call of Aug. 30, 1868, paid $100. R. S. Elliott, sec'y. 2½ % call of Sept. 19, '70, p'd $25.00. Call of Oct. 16, 1871, for 10 %, paid. Call of Febr'y 27, 1872, for 20 %, paid by note and cash.

No. 14 A. ST. LOUIS, *July 20th*, 1866.

On demand we, jointly and severally, Britton A. Hill, as principal, and W. H. W. Horner, as security, promise to pay to the order

of the Excelsior Insurance Company of St. Louis seven hundred and fifty dollars for value received, negotiable and payable without defalcation or discount.

$750. BRITTON A. HILL.
W. H. W. HORNER.

Endorsed: 1868, Oct. 30. Call of Aug. 31, 1868, paid $100. R. S. Elliott, sec. 2½ % call of Sept. 19, '70, paid $25. Call of Oct. 16, 1871, for 10 %, paid. Call of Feb'ry 27th, for 20 %, paid by note & cash.

No. 15 A. ST. LOUIS, *July 20th*, 1866.

On demand we, jointly and severally, Britton A. Hill, as principal, and W. H. W. Horner, as security, promise to pay to the order of the Excelsior Insurance Company of St. Louis seven hundred and fifty dollars for value received, negotiable and payable without defalcation or discount.

$750. BRITTON A. HILL.
W. H. W. HORNER.

Endorsed: 1868, Oct. 30. Call of Aug. 31, 1868, paid $100. R. S. Elliott, sec. 2½ % call of Sept. 19, '70, paid $25. Call of Oct. 16, 1871, for 10 %, paid. Call of Febr'y 27th, for 20 %, paid by note & cash.

No. 7 A. ST. LOUIS, *July* 11, 1866.

On demand we, jointly and severally, Britton A. Hill, as principal, and Daniel T. Jewett, as security, promise to pay to the order of the Excelsior Insurance Company of St. Louis eighteen hundred dollars, for value received, negotiable and payable without defalcation or discount.

$1,800. BRITTON A. HILL.
DANIEL T. JEWETT.

Endorsed: 1868, Oct. 30. Call of Aug. 31, 1868, paid $240. R. S. Elliott, sec. 2½ % call of Sept. 19, '70, p'd $60. Reduction
9 of note under vote of Jan. 20, 1871, to reduce capital, $251.25. Call of Oct. 16, 1871, for 10 %, paid $130. Call of Febr'y 27th, 1872, for 20 %, paid by cash, $240, note 3 mo. from Jan'y 20, '72, for $500, am't note paid.

And here plaintiff rested.

And thereupon the defendant asked the court to give the following instructions:

Def't's Inst. Refused.

The court declares the law to be that defendant's liability as a subscriber to the capital stock of the defendant in the suit on which this motion is based ceased by limitation before this motion was filed. The court declares the law to be that under the evidence in

this case the defendant had paid for all the stock subscribed by him in the Excelsior Insurance Co., the defendant in the principal suit on which this motion is based, before said motion was filed, which the court refused, and defendant thereupon duly excepted.

And thereupon defendant was sworn as a witness and testified in substance:

Testimony of B. A. Hill.

That he had made the payment on the stock, as shown by plaintiff, but that he had always understood that when the reduction of stock was made in 1870 to $100,000 the prior payments made by the subscribers were to be and were applied by the company as made upon the reduced stock, and on this theory he had paid for his stock in full in cash, less about $190.00; that in 1872, when said company concluded to quit taking risks, he was employed by the company to prepare a bill in equity to close its affairs; that with very considerable labor and time he prepared such a bill, making all the stockholders parties; that in preparing this bill he was compelled to examine the books of the company and the pecuniary condition of the persons who had subscribed for the stock of the company and had not paid for the same, and found that the company could pay off all its liabilities with the assets remaining on hand, and that an assessment of ten or fifteen per cent. on the stock would have met all claims against the company, and that the reasonable value of the services so rendered by him was 500.00; that he did not file this bill in equity, as Messrs. Donovan & Conroy were employed by the company just at the time he had the same prepared to file, and he was superseded by them and they pursued another course.

Defendant also testified that the notes offered in evidence by the plaintiff were given by him to the Excelsior Ins. Co. in payment for his subscription to its stock and were so accepted, and that he had paid all assessments whenever official notice was given him by the company.

Witness stated on cross-examination that he had never presented to the company any bill for his services and had never made any claim therefor in the sum of $500 or any other amount, and this was all the evidence.

And thereupon the court ordered an execution to issue against defendant, on said motion, for $2,127; to which action of the court defendant then & there duly excepted.

And thereupon, on the 15th day of December, 1880, defendant filed his motion for a new trial in words and figures as follows, to wit:

Motion for New Trial.

In Circuit Court, City of St. Louis.

THE MERCHANTS' INSURANCE CO., Plaintiff,
vs.
BRITTON A. HILL, Stockholder in Excelsior Ins. Co.

And now comes the defendant, Britton A. Hill, and moves this court to set aside the order for execution made against him in this case on the 13th inst. and grant him a new trial for the following reasons, to wit:

1st. The order so made is against the law and the evidence.

2nd. The defendant is not, in law, subject to this proceeding.

3rd. The charter of the Excelsior Insurance Company expressly exempts its stockholders from this proceeding.

4th. The execution is ordered to issue for an amount largely in excess of the amount due by defendant Hill to the Excelsior Ins. Co. on account of his subscription to its capital stock.

5th. It appeared from the evidence that defendant Hill had paid for his stock in full to Excelsior Ins. Co.

6th. That plaintiff's demand or right to this proceeding against defendant was barred by the statute of limitations.

7th. The court refused to allow defendant Hill his counter-claim against the Excelsior Insurance Co.

8th. The court refused to allow defendant Hill credit for the amount paid by him on account of his said stock.

9th. It appeared from the evidence that the plaintiff was not entitled to prosecute this action and no such party or corporation existed.

G. M. STEWART AND
N. OSCAR GRAY,
For Defendant Hill.

11 Which motion the court overruled on the 7th day of February, 1881; to which action of the court in overruling said motion defendant then and there duly excepted and now excepts and files this his bill of exceptions and asks that the same be signed and sealed and made a part of the record hereof, which is done accordingly.

WILBUR F. BOYLE, *Judge.* [SEAL.]

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Britton A. Hill, of lawful age, being duly sworn, says upon his oath that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court.

BRITTON A. HILL.

Sworn to and subscribed before me this 11th day of March, 1881.
[SEAL.] WM. PRESTON HILL,
Notary Public.

Know all men by these presents that we. Britton A. Hill, as principal, and William Preston Hill and William E. Bent, as sureties, are held and firmly bound unto Merchants' Mutual Insurance Company in the sum of forty-three hundred & fifty dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at St. Louis this 15th day of March, A. D. 1881.

The condition of the above obligation is such that whereas said Britton A. Hill has appealed from the judgment rendered against him and in favor of Merchants' Mutual Insurance Co. in the circuit court, city of St. Louis, for the sum of two thousand one hundred seventy-seven dollars and fifty cents, together with costs:

Now, if said appellant shall prosecute his appeal with due diligence to a decision in the St. Louis court of appeals and shall
12 perform such judgment as shall be given by the St. Louis court of appeals, or such as the St. Louis court of appeals may direct the circuit court, city of St. Louis, to give, and if the judgment or any part thereof be affirmed will comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded against him by the St. Louis court of appeals, then this obligation to be void; otherwise to remain in full force and effect.

BRITTON A. HILL. [SEAL.]
WM. PRESTON HILL. [SEAL.]
WM. E. BENT. [SEAL.]

Approved by the court March 15th, 1881.

Attest: CHARLES F. VOGEL, *Clk.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Saint Louis, this 25th day of July, 1881.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

And afterwards, at the October term, A. D. 1881, of the St. Louis court of appeals, to wit, on the 8th day of December, 1881, there — filed the following assignment of errors in said cause, to wit:

In the St. Louis Court of Appeals. October Term, 1881.

THE MERCHANTS' INSURANCE COMPANY, Resp.,
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTON A. HILL, Stockholder, Appellant. } No. 2309.

13 And now comes the said Britton A. Hill, by his attorney, and says that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for said error said appellant assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by plaintiff.

2. That said court rejected proper and legal testimony offered by said defendant Hill.

3. That the court gave to the jury improper and illegal instructions.

4. That the court refused to give to the jury proper and legal instructions offered by defendant Hill.

5. That the verdict was against the evidence.

6. That the verdict was against law.

7. That the verdict was against both law and evidence, and against the law under the evidence.

8. That the verdict was against the weight of evidence.

9. That the judgment was rendered in favor of the Merchants' Ins. Co., plaintiff, when it should have been rendered for the said defendant Hill.

That said court overruled the motion for a new trial made by said defendant Hill.

10. That the court below erred in holding that said defendant Hill, a stockholder in said Excelsior Insurance Company, under its charter was liable to this proceeding on motion and for a second liability to a judgment creditor of said corporation, when by the charter he was exempt from such proceeding and such liability, and was only liable, if liable at all, on a bill in equity against all or some of the stockholders owing unpaid balances of stock to contribute his *pro rata* share towards making up the plaintiff's demand.

11. That the court erred in holding this defendant liable for an unpaid balance of stock on the basis of his original sub-
14 scription, and not on the basis of the amount & number of shares owned & unpaid for at the date of this proceeding.

N. H. HOLMES,
Of Counsel for App'l't.

And now comes the respondent and, for joinder in error, says there is no error in the record and proceedings of said circuit court in said cause as assigned by said —.

PATTISON & CRANE,
Att'ys for Respondent.

And afterwards, at the March term, A. D. 1882, of the Saint Louis court of appeals, the following further proceedings were had in said cause, to wit:

Judgment.

THE MERCHANTS' MUTUAL INSURANCE COMPANY, Respondent,
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTON A. HILL, Stockholder, Appellant. } 2309.

Appeal from the circuit court, city of St. Louis.

TUESDAY, *May 2nd*, 1882.

Now again come the parties aforesaid, by their respective attorneys; and the court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by said circuit court, city of Saint Louis, be in all things affirmed and stand in full force and effect, and that said respondent recover of said appellant its costs and charges herein expended and have execution therefor.

Opinion filed, which said opinion is in the words and figures following, to wit:

Opinion of the Court.

THE MERCHANTS' INSURANCE CO., Respondent,

vs.

THE EXCELSIOR INSURANCE CO., BRITTON A. HILL, a Stockholder, Appellant.

Appeal from the circuit court of the city of Saint Louis.

This was a proceeding by motion in the Saint Louis circuit court against the appellant, Britton A. Hill, as a stockholder in the
15 defendant corporation, for an alleged balance of unpaid stock, under sec. 736 of the Rev. Stat. of 1879 (1 R. S., p. 121). Adopting the clear and accurate statement of the appellant, it appears that on the hearing of the motion the plaintiff offered evidence tending to show that the defendant corporation was chartered by the special and private act of February 9, 1859 (Sess. Acts of 1859, p. 74), with "the same rights, privileges, and restrictions" as the Washington Insurance Co., chartered by the act of March 3, 1857 (Sess. Acts of 1857, p. 544), excepting only so much of sec. 8 of that act as declared it a "public act," and thereby excepting the new corporation out of the operation of secs. 7, 13, 14, 15, 16, and 18 of art. 1 of the general "corporations" act of Nov. 23, 1855 (Rev. Stat. of 1855, p. 372). The capital stock was thereby limited to not less than $50,000, and not more than $1,000,000, but it was otherwise left open to the corporation to determine the amount.

That on the 20th of July, 1866, the defendant Hill became a subscriber for 64 shares of the stock of the corporation, of the par value of $100.00 a share, and paid up 25 per cent. thereof in cash on sub-

scription and gave his stock notes for the balance thereof, one dated the 11th July and three dated the 20th July, 1866, payable on demand and subject to calls for installments on notice when required, and that prior to the 20th day of January, 1871, said defendant had made further payments in cash to the amount of $240.00, including all.

That on said 20th of January, 1871, the capital stock of the defendant corporation was reduced to $100,000.00, and that the defendant Hill's shares were reduced to 37 shares, of $100 a share at par value, in place of the 64 shares by him subscribed, and that after such reduction he made further payments thereon in cash to the amount of $1,110 on and prior to the 27th of Feb., 1872, making in all $3,510 paid, leaving (according to the appellant's view of the evidence) a balance of $190.00 on his 37 shares at that date.

16 That in 1872 the corporation ceased doing business, reinsured its risks, and proceeded to wind up its affairs; and that after that date a further call was made on the defendant Hill, which he refused to pay, saying that the corporation owed him more for his professional services than he owed the company for his stock.

That the reduction was such that (as testified by Mr. Conroy, attorney for the corporation) "*that* the capital stock of the company was reduced to $100,000, with twelve and one-half per cent. paid up, and that the subscriptions were equalized on this basis, which left the defendant thirty-seven shares."

That the plaintiff obtained judgment against the defendant corporation on the 9th of May, 1878, for $5,653.80 and costs, and had execution thereon returned *nulla bona* on the 15th of Febr'y, 1879.

At the close of the plaintiff's case the defendant Hill asked the following instructions, which were refused, and an exception taken:

"1. The court declares the law to be that defendant's liability as a subscriber to the capital stock of the defendant in the suit on which this motion is based ceased by limitation before this motion was filed."

"2. The court declares the law to be that under the evidence in this case the defendant had paid for all the stock subscribed by him in the Excelsior Insurance Company, the defendant in the principal suit on which this motion is based, before said motion was filed."

The defendant then testified in his own behalf that he had made the payments shown him by the plaintiff; that he had always understood that when the reduction of the stock was made in 1870 to $100,000 the prior payments made by the shareholders were to be and were applied by the company as made upon the reduced stock, and that on that theory he had paid for his stock in full in cash less about $196.

17 He also testified that in 1872, when the company concluded to quit taking risks, he was employed by the company to prepare a bill in equity to close its affairs, and that with considerable labor and time he prepared such a bill, making all its stockholders parties; that in preparing this bill he was compelled to ex-

amine the books of the company and the pecuniary condition of the persons who had subscribed for the stock of the company and had not paid for the same, and found that the company could pay off all its liabilities with the assets remaining on hand, and that an assessment of 10 or 15 per cent. on the stock would have met all the claims against the company, and that the reasonable value of the service so rendered by him was $500.00.

He also testified that the notes offered in evidence by the plaintiff as given by him to the company were given in payment for his subscription to its stock, and were so accepted, and that he paid all assessments whenever official notice was given him by the company, but that he never presented any bill or made any claim against the company for his services. It does not appear that the company ever sued him for any balance of stock thereafter.

And thereupon the court, after advisement, found that the defendant was and is a stockholder in such corporation, owning thirty-seven shares of stock, of the par value of $100 each, and that the unpaid balance on said shares is $2,127.50, and that he is liable to the execution of the plaintiff in this amount, and ordered execution for said sum and costs.

Thereupon the defendant Hill filed his motion for a new trial, for the reasons therein specified, covering all the points intended to be raised here; which motion was overruled and an exception taken, and the case is brought up by appeal.

The following questions are raised in this record:

1. The appellant directs attention to the fact that the mo-
18 tion upon which this proceeding is based is not incorporated into the bill of exceptions, and he therefore takes the position that there is nothing for this court to pass upon. It is true that a motion in a case is no part of the record proper, and that whenever the terms of a motion become material the motion must be incorporated into the bill of exceptions, for it is not everything which the clerk of the circuit court may choose to copy into the transcript which thereby becomes a part of the record. United States *v.* Gamble, 10 Mo., 457; State *v.* Wall., 15 Mo., 208; London *v.* King, 22 Mo., 336; Blount *v.* Zink, 55 Mo., 455; Corley *vs.* Tracy, 62 Mo., 512. But this rule applies only in cases where it is material to consider what the terms of the motion were. Welch *v.* St. Louis, No. 1284, Mo. App. Here the bill of exceptions states that a motion was filed by the plaintiff in this behalf against the defendant as a stockholder in the Excelsior Insurance Company, and this is a sufficient statement of record of the nature of the proceeding.

2. The next point is made by the appellant, and it is that the stockholders of this company are, by the terms of its charter, exempt from this summary proceeding by motion. Recurring to the statement of facts, it will be perceived that the corporation was created by a special charter passed February 9, 1859. Sess. Acts of 1859, p. 74. Section one of this act provided: "That an insurance company be, and is hereby, established in the city of St. Louis, to be known by the name and style of the 'Excelsior Insurance Company,' the stockholders of which are hereby declared a body corporate and politic,

with the same amount of capital stock and period of existence and with the same rights, privileges, and restrictions as were conferred upon the 'Washington Insurance Company' of St. Louis by an act of the General Assembly of the State of Missouri approved March 3d, 1857, with the exception of so such of sec. 8 of said act as declares the same a public act and exempts said corporation from the
19 operation of sec. 18 of article 1st of the act entitled 'An act concerning corporations' approved November 23d, 1855."

The provision here referred to in the charter of the Washington Insurance Company is as follows, so far as material: "* * * The corporation established by this act shall be, and the same is hereby, exempt from the operation of secs. 7, 13, 14, 15, 16, and 18 of article 1st of the act entitled 'An act concerning corporations,' approved November 23d, 1855, and said sections shall be deemed as repealed, so far as the same concerns the corporation hereby established." Laws 1856–'7, p. 545, sec. 8.

The provisions of the act of November 23d, 1855, concerning corporations here referred to, from the terms of which the Excelsior Insurance Company was thus exempted, were embodied in the Revised Statutes of 1855, and, so far as material, were as follows:

"The charters of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension, and repeal in the discretion of the Legislature." R. S., 1855, ch. 34, sec. 7.

In all corporations hereafter created by the Legislature, unless otherwise specified in their charter, in case of deficiency of corporate property or estate liable to execution, the individual property rights and credits of every member of the copartnership or body politic having a share or shares therein shall be liable to be taken on execution to an additional amount equal to that of the amount of his stock and no more for all debts of the corporation contracted during his ownership of such stock, and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation and for the term of six months after judgment recovered against such corporation in any suit commenced
20 within the year aforesaid, provided that in every such case the officer holding the execution shall first ascertain and certify upon such execution that he cannot find corporate property or estate." R. S., 1855, ch. 34, sec. 13.

"In such case the officer may cause the property of such stockholder to be levied upon by execution in the same manner as if the same were against him individually, after giving him forty-eight previous hours' notice of his intention and the amount of the debt of deficiency, if he reside within the county, or, if not within the county, to his agent, if he have any within the county; otherwise to the clerk or cashier or some other officer of the corporation, unless such stockholder, his agent, or the clerk or other officer, on demand and notice as aforesaid, shall disclose and show to the execution creditor or the said officer corporate property or estate subject to execution sufficient to satisfy said execution and all fees." R. S., 1855, ch. 34, sec. 14.

"Such creditor, after demand and notice as mentioned in the preceding section, at his election, may have an action against any such stockholder or stockholders on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover of him or them individually the amount of his execution and costs or of the deficiency as aforesaid not exceeding the amount of the stock held by such stockholder or stockholders." R. S., 1855, ch. 34, sec. 15.

It will be perceived that this statute falls within that class of statutes which create a liability and prescribe a remedy for its enforcement. It created what was known in this State as a "double liability," and prescribed a remedy to enforce it. It related solely to this superadded liability. It had no reference to what may be called a stockholder's common-law liability—the liability which he assumes by contract, and which is generally worked out for the benefit of the creditors of the corporation by the processes fur-
21 nished by courts of equity. Irrespective of this statute every stockholder in the Excelsior Insurance Company stood liable to pay the amount which he had subscribed to the capital stock of the company; and, in the event of the insolvency of the company, he stood liable to pay it to a receiver, to an assignee, or other trustee representing the creditors. It is unnecessary to cite authorities to this proposition. It has been constantly recognized by our supreme court, by this court, and by other American courts, State and Federal. It proceeds upon the well-settled rule that the capital stock of a corporation is a trust fund for its creditors, and that in the event of the insolvency of the corporation a court of equity will appoint a trustee to collect and administer this fund for their benefit.

What, then, is the effect upon this liability of the statute of 1879, under which the present proceeding is instituted? Does it operate to impose on the defendant a more onerous liability than that under which he stood by virtue of the charter of the company? Did it change any rule of evidence so as to render it possible to charge him with liability upon a smaller quantum or lower grade of evidence than would have been necessary before? In short, did it come within any of the definitions of a retrospective law or a law impairing the obligation of contracts, or was it a law affecting merely the remedy—the mode of procedure—to which a creditor of the corporation might resort in order to enforce the liability which the defendant assumed by his contract of subscription?

The statute would seem to have no other effect than to change the creditor's remedy from a protracted and expensive suit in equity, in which all the shareholders, so far as practicable, would have to be made parties, in which all the creditors would be beneficiaries, and in which the whole fund might be eaten up with costs, to a direct,
22 informal, and inexpensive proceeding against any stockholder whom the creditor might have chance to find who had not paid into the capital stock of the debtor corporation the amount which he had agreed to pay in his contract of subscription. We cannot see wherein the liability of the stockholder is made more onerous by the remedy afforded by the Revised Statutes, although

it is reached and enforced more quickly and with less expense to the creditor.

The learned counsel for the defendant suggests that his
23 liability is rendered more onerous in this, that, independently of the general law, his liability could only be enforced in equity upon a bill filed against all the solvent stockholders owning unpaid balances of stock within the jurisdiction of the court, in which proceeding he would be liable to pay his *pro rata* contribution towards making up the amount of the plaintiff's demand and no more; whereas he argues that the effect of this proceeding, by motion given by the general law, is to subject him to a several liability to the plaintiff for the whole amount of his unpaid stock without giving him any remedy over against other stockholders for a contribution in respect of their shares, the statute proceeding being against the stockholders severally and not jointly. If this were the effect of the general law we should not hesitate to hold that it could not operate upon the present charter without substantially impairing the rights of the shareholders of this company and coming within the constitutional inhibition against retrospective laws and laws impairing the obligation of contracts, but we do not think that it can be held to have such an operation. The case of Andrews *vs.* Collender, 13 Pick., 484, to which the learned counsel refers as supporting this view, is certainly an unsatisfactory case in so far as it holds that the members of a corporation who
24 are made by statute jointly and severally liable to pay the debts of the corporation cannot have contribution against each other for the purpose of equalizing their burdens, because the statute which creates the liability does not provide for contribution. I am free to say that I do not think it can be vindicated on sound principles. The statute there in question made the members of the corporation liable, substantially, as partners, and the right which partners have as among themselves, to have their common burdens equalized, would follow on the plainest principles of justice without the statute so providing. It has been held that a stockholder who has been compelled to pay a debt of the corporation may maintain an action for contribution against all the stockholders who were such at the time of the contracting of the debt, although the stockholders are liable severally under the statute. Aspinwall *vs.* Torrance, 1 Laws, 381. It was so held in Judson *vs.* Rossie Yalend Co., 9, page 598, where the liability was joint & several. So it is said in another case by Denis, J.: "If a stockholder is sued to enforce his individual liability he may resort to a suit for an account and contribution." Garrison *vs.* Howe, 17 N. Y., 458. See also Stewart *vs.* Lay, 45 Iowa, 614. So under statutes where the liability of the stockholders is similar to that of partners it is said that "They should be left to such remedies as have been pro-
25 vided by law for the adjustment of partnership transactions. They may go into chancery for an account and to have the claims of all parties settled upon an equitable principle." Brown J., in Bailey *vs.* Buckner, 3 Hill, 188, and see Allen *vs.* Sewall, 2 Wend., 327; Moss *vs.* Oakley, 2 Hill, 269; Farron *vs.* Bromys, 13

Rich. Eq., 25. But if the case of Andrews *vs.* Collendar, *supra*, were to be regarded as sound it would still not be an authority for the position here contended for, and for the very reason on which that case was decided, that the liability there in question was a statutory liability, while here we are dealing only with the liability which the principles of equity attach to the subscriber's contract. No reason has been suggested, and we can see none in the nature of things, why the giving by Legislature of the direct and inexpensive remedy by motion should be construed to deprive the shareholder thus proceeded against of his right of contribution against his fellow-shareholders. The only change which we can perceive in the nature of the remedy is this: Under the proceeding in equity the labor, delay, and perhaps the expense of securing to shareholders the equalization of their burdens as among themselves falls upon the moving creditor, who is not benifitted by it, whereas under the st-utory remedy it falls on the shareholder, who is benefited by it.

Such a change of remedies, we are clear, is not so extensive
26 as to fall within any constitutional inhibition. The question thus seems clear upon principle, but there are not wanting authorities in support of the conclusion at which we have arrived. The case- of Stanley *vs.* Stanley, 26 Me., 191, and Marcy *vs.* Clark, 17 Mass., 334, which hold that it is competent for the Legislature to pass a law making the private property of the stockholders of existing corporations liable to be taken in execution for debts of such corporations thereafter contracted, such liability not existing before, go much further than we go in this case. They apply to the case of this defendant in this respect: That he became a shareholder in this corporation after the Revised Statutes of 1565, which first gave the present remedy by motion, went into effect. These cases, however, are not well reasoned, and it is not necessary that we should commit ourselves to the doctrine which they lay down. Other cases, though not directly in point, furnish more persuasive annalogies. Although the right of the creditor of a corporation to the security afforded by the liability under which its stockholders stand by the laws existing at a time of the contracting of his debt is in the nature of a contract and cannot be impaired by subsequent legislation (Hawthorne *vs.* Calef, 2 Wall., 10), yet statutes which give the right to arrest and imprison a stock-

holder for a debt due the corporation (Penneman's Case, 11
27 R. I., 333), and statutes which drive such a creditor from a direct proceeding by suit at law against any individual stockholder to a general proceeding in equity brought by a trustee on behalf of all creditors against all stockholders (Strong *v.* Tierman, 25 N. Y, 214; The Commonwealth *v.* Cochetuate Bank, 3 Allen 42), do not impair the obligation of the corporations contract, but affect the remedy merely, and are hence not unconstitutional. The rule of the latter cases ought to work both ways. If the present remedy by motion had been the only remedy existing at the time this plaintiff contracted its debt it would be competent under these decisions for the Legislature to take it wholly away and to substitute a remedy in equity, and the plaintiff could not complain, for he would have

a substantive, though not as cheap and speedy a remedy, left. So this defendant cannot complain that the remedy against him is so far changed that he must seek his remedy for contribution at his own suit and at his own expense, and that the creditor is not bound, as before, to extend to him his remedy for contribution at the same time that he enforces his own right.

2. The appellant also argues that the provision of the Revised Statutes under which this proceeding is instituted (R. S., § 28 736), being a general law, is not to be construed as applying to stockholders in corporations which, like the present, were created by special statutes previously enacted, and in support of this view he appeals to the well-understood principle that a general statute treating a subject in a general manner, and not expressly contradicting a special statute previously enacted, is not construed as affecting the more particular and positive provisions of the special statute, unless it is necessary so to construe it in order that its language may have any meaning at all. The rule is not, perhaps, as strong as the learned counsel for the appellant has here stated it. It proceeds upon the maxim which obtains in the construction of all written instruments and laws, *generalia specialibus non derogant*, and it is founded upon the idea that the Legislature, having given its providential attention to a special subject, is not to be understood by the subsequent enacting of a general law relating to all similar subjects as intending to abrogate what it has thus specially provided for. State *ex rel.* Rosenblatt *v.* Wesleyan Cemetery Association, No. —, Mo. App. We are disposed to give full effect to this principle in the interpretation of our legislation. In view of this principle, we decided some time since, upon an oral motion, that graduates 29 of the law school of the State University and of the law school of the Washington University of St. Louis are entitled to be admitted to practice in the courts of this State upon an exhibition of their diplomas, notwithstanding the general provision of the Revised Statutes of 1879, which requires an examination of all candidates for admittance to the bar.

We did not consider that the Legislature in enacting these general provisions intended to repeal, without mentioning it, a previous statute enacted with special reference to those law schools, providing that their diplomas should entitle their graduates to admission to practice in the courts of this State. We understand that the supreme court, upon a similar motion, took the same view. We think, however, that it will appear, from a consideration of the subject before us, that this is not a case for the application of this principle. Here the Legislature has chartered a corporation by a special law and has exempted its stockholders from the superadded or double liability provided for by a general law existing at the time, but it has not provided any special remedy or mode of proceedure for enforcing on behalf of creditors the general liability which the stockholders of this corporation would assume by virtue of their contracts of subscription. The provisions of the Revised Statutes of 1879, upon which this proceeding is founded, do

not, therefore, derogate from anything which is con-
30 tained in the charter of the Excelsior Insurance Company.

Moreover, it should be considered that the statute under which this proceeding is instituted (1 R. S., § 763) is couched in the broadest possible general terms. It rec-tes: "If any execution shall have been issued against any corporation," etc. Now, when it is considered that when this statute was enacted there existed in this State a very great number of corporations created by special acts of the Legislature, having numerous stockholders and very great aggregation of capital, it can scarcely be supposed that the Legislature intended to limit the remedy there provided for to such corporations as had been, or might thereafter be, formed under the general law relating to corporations. An examination of the reported decisions in which proceedings against stockholders by motion have been upheld will show that several of them have been in cases of corporations created by special charters, and this would indicate that the understanding of the profession has been contrary to the appellant's position.

3. It remains to consider the defense of payment and set-off interposed by Mr. Hill. We may premise that this proceeding is so far in the nature of a proceeding at law that the findings of fact made by the circuit court will be de-med conclusive in this court,
31 if the bill of exceptions shows that there was substantial evidence to support such findings. This was no doubt the understanding of the appellant when he drew his bill of exceptions, for it does not purport to set out the testimony *in hæc verba*, but it merely recites that there was testimony tending to show certain facts, as a bill of exceptions should do in cases at law. We could not be expected upon such a presentation of the evidence to consider the questions of fact *de novo*, as we do in an appeal in equity.

The circuit court has found that Mr. Hill was and is a stockholder in the Excelsior Insurance Company, owning thirty-seven shares of stock, of the par value of $100 each; that the unpaid balance on said shares is $2,127.50, and execution against him was awarded for this amount. The bill of exceptions discloses substantial evidence to support this finding. This will be seen by recurring to the statement of facts which we have already given. We may concede most of the positions, as to the law, taken by the counsel for the appellant, with reference to this question of payment—that the right of the plaintiff attaches only to those who were stockholders owing an unpaid balance at the time when this motion was filed (McClaren *v.* Franciscus, 43 Mo., 452), and that the corporation had power to reduce its capital stock to $100,000 in the year
32 1871, there being no evidence in the record that it owed any debts at that time—but we cannot concede the legal conclusion that this reduction of capital stock operated as a failure of consideration *pro tanto* on the original subscriptions and on the stock notes given on the unpaid balance.

The evidence as preserved in the bill of exceptions is very meagre as to the terms of this reduction. What led to it, what was the volume of the capital stock prior to it, and how a capital stock, 25

per cent. of which had been paid up, came to be reduced to a smaller stock with but 12½ per cent. paid up; but the substantial evidence is that this was the fact, and the inference is that it was upon some scheme of reorganization devised to meet the needs of the company or, possibly, to keep it out of embarrassments. It is sufficient for us to see that the finding of the circuit court was supported by substantial evidence to the effect that in 1871 the capital stock was reduced to the aggregate of $100,000; that the scheme of readjustment was such that Mr. Hill became the holder and owner of thirty-seven shares of the stock as reduced, of the par value of $100 each; that of the value of these shares but 12½ per centum was deemed to have been paid, and that he stood liable to pay the remaining 87½ per cent. when it should be called for by the
33 directors or otherwise in accordance with law; that he thereafter paid upon one call two per centum of the value of these shares, or $370.00, and upon another call 20 per cent., or $740.00, whereby he had paid in all prior to the time of this motion 42½ per centum of the $3,700.00, which represented the aggregate value of these shares, and stood liable to pay the remaining 57½ per centum, which would amount to $2,127.50, the amount for which the circuit court awarded execution against him.

The conclusion of the circuit court was, therefore, supported by substantial evidence and was right, unless the court erred in refusing to allow Mr. Hill's claim of set-off. The nature of this claim is fully stated in the early part of this opinion, and from the statement there given it sufficiently appears that, at the time when this motion was filed, it was barred by the statute of limitations of five years. It was not and is not claimed to have been a case of mutual running accounts, and nothing is shown to take it out of the operation of the statute. The position of the learned counsel for the appellant, that the amount due by the defendant corporation to Mr. Hill operated as a valid satisfaction of his liability as a shareholder, finds no support in the case cited in support of it. (Weberr *vs.*
34 Ligton, 8 Nev. App., 502.) That case simply decides that a stockholder in a corporation proceeded against by a creditor by motion, as in this case, may set off against his liability any debt which is due by the corporation to him; but the debt there referred to is a debt which is alive and subsisting at the time when the motion is made, and not a claim which has been extinguished by operation of the statute of limitations. It has never been the understanding of the courts with reference to the operation of statutes of limitation upon counter-demands which opposing parties litigant may have had against each other that such demands off-set and adjust themselves by their own vigor or by operation of law without any accounting or settlement had between the parties. The only exception to this is in the case of merchants' accounts or mutual, open, and current accounts under our statute (1 R. S., § 3223), which this is not claimed to be and clearly is not. So that if A sues B upon a note made by B seven years ago B cannot defeat A's recovery by pleading and proving that six years ago A became indebted to him upon an account in a greater sum than the amount of the note.

Angell Lim., 6th Ed., § 148, 149. We make these statements of doctrine for the purpose of making our position clear and not as intimating that the learned counsel for the appellant has urged anything in opposition to principles so well understood. The case here is conducted without formal pleadings. If Mr. Hill's counter-claim had been a good counter-claim it would have been allowed merely upon evidence setting it up without requiring him to plead it. That it appears on the evidence setting it up to have been barred by limitation at the date of the motion is as fatal to it as though the statute of limitations had been pleaded.

If we are right in these views it results that the judgment of the circuit court must be affirmed. It is so ordered.

All the judges concur.

SEYMOUR D. THOMPSON.

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

MERCHANTS' INSURANCE COMPANY, Respondent,
vs.
EXCELSIOR INSURANCE COMPANY, Appellant. } 2309.

TUESDAY, *May 16th*, 1882.

Now comes said appellant, by its attorney, and files its prayer & affidavit for an appeal herein; whereupon an appeal is granted it to the supreme court of the State of Missouri from the judgment herein rendered, and thereupon it files its appeal bond in the penal sum of five thousand dollars, with William Preston Hill and William E. Bent as sureties, which bond is by the court approved.

Which said prayer, affidavit, and appeal bond are, respectively, in the words and figures following, to wit:

Prayer for Appeal.

In the St. Louis Court of Appeals. March Term, 1882.

MERCHANTS' INS. CO., Appellee,
vs.
EXCELSIOR INS. CO., BRITTON A. HILL, Appellant.

Now comes the said Britton A. Hill, by his attorney, and prays for an appeal to the supreme court of the State of Missouri from the judgment of this court in this cause rendered, and files herewith the affidavit of said Britton A. Hill for said appeal.

N. HOLMES,
Att'y for Appellant.

Affidavit for Appeal.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Personally appeared the above-named Britton A. Hill, app'l't, —, being duly sworn, upon his oath says that his appeal in the

above-entitled cause is not made for vexation or delay, but because the affiant believes that he is aggrieved by the judgment or
37 decision of the court therein.

B. A. HILL.

Sworn to and subscribed before me this 10th day of May, A. D. 1882.

Witness my hand & official seal.

[SEAL.] C. D. GREEN, JR.,
Notary Public.

Know all men by these presents that we, Britton A. Hill, as principal, and Wm. Preston Hill and William E. Bent, as sureties, are held and firmly bound unto Merchants' Mutual Insurance Company in the sum of five thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly & severally, firmly by these presents.

Sealed with our seals and dated at St. Louis this 16th day of May, A. D. 1882.

The condition of the above obligation is such that whereas said Britton A. Hill has appealed from the judgment rendered against him and in favor of said Merchants' Mutual Insurance Company in the St. Louis court of appeals, now, if said appellant shall prosecute his appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the Supreme Court may direct the St. Louis circuit court, in the city of St. Louis, State of Missouri, to give, and if the judgment or any part thereof be affirmed will comply with
38 and perform the same, so far as it may be affirmed, and pay all damages and costs which may be awarded against him by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

BRITTON A. HILL. [SEAL.]
WM. PRESTON HILL. [SEAL.]
WM. E. BENT. [SEAL.]

Approved in open court the 16th day of May, 1882.

Attest: JOS. F. BAIER, *Clerk.*

STATE OF MISSOURI, *ss:*

I, Joseph F. Baier, clerk of the St. Louis court of appeals, do hereby certify that the above and foregoing is a full, true, & complete transcript from the record & proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office, in the city of St. Louis this 19th day of July, 1882.

[SEAL.] JOS. F. BAIER, *Clerk.*

39 *Proceedings in Supreme Court.*

And afterwards, to wit, in vacation, and on September 30th, 1882, the following further proceedings were had in said cause, to wit:

Assignment of Errors.

In the Supreme Court of Missouri. October Term, 1882.

THE MERCHANTS' INSURANCE COMPANY, Res.,
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTAIN A. HILL, Stockholder, Appellant.

And now comes the said Brittain A. Hill, by his attorney, & says that in the record & proceedings of the courts below in this cause there is manifest error, and appellant assigns for error the following, to wit:

1st. That said court admitted improper and illegal testimony for plaintiff.

2d. That said court rejected competent evidence offered by the defendant.

3d. That the said court improperly held jurisdiction in this case.

4th. That the court refused to give proper and legal instructions asked by said Hill.

5th. That the finding of the court was against *against* law & against law & evidence.

6th. That the judgment was rendered in favor of the said
40 Merchants' Insurance Company, when it should have been rendered for the said Hill, and that said court overruled the motion for a new trial made by said Hill, when it should have been granted.

7th. That the court below erred in holding that said defendant Hill, a stockholder in said Excelsior Insurance Company, under its charter was liable to this proceeding on motion, and for a second liability to a judgdment creditor of said corporation, when by the charter he was exempt from such proceeding & such liability, and was only liable, if at all, on a bill in equity against all or some of the stockholders owing unpaid balances of stock to contribute his *pro rata* share towards making up the plaintiff's demand.

8th. That the court erred in holding this defendant, Hill, liable for an unpaid balance of stock on the basis of the original subscription by him, and not on the basis of the amount & number of shares owned & unpaid for at the date of this proceeding.

N. HOLMES,
BRITTAIN A. HILL,
Att'ys for Def't.

And now comes the respondent, & for joinder in error says
41 there is no error in the record and proceedings of said circuit court nor of said St. Louis court of appeals in said cause, as assigned by said appellant.

PATTISON & CRANE,
Att'ys for Respondent.

And afterwards, to wit, at the October term, 1884, and on the 31st of October, 1884, the following proceedings were had in said cause, to wit:

THE MERCHANTS' INS. CO., Resp.,
vs.
THE EXCELSIOR INS. CO., App.

* * * * * * *

Now, at this day, on motion of parties, by attorneys, it is ordered that the above causes be continued to the foot of the January call.

And afterwards, to wit, at the same term and on January 22d, A. D. 1885, the following further proceedings were had in said cause, to wit:

MERCHANTS' INS. CO., Resp., *vs.* THE EXCELSIOR INS. CO., App.

* * * * * * *

Come now the parties in the above causes, by attorneys, and, after argument therein, submit the same to the court.

42 And afterwards, to wit, at the October term, 1885, and on the 28th of October, A. D., 1885, the following further proceedings were had in said cause, to wit:

Judgment.

THE MERCHANTS' MUTUAL INSURANCE COMPANY, Respondent,
vs.
THE EXCELSIOR INSURANCE COMPANY, BRITTON A. HILL, Stockholder, Appellant.

Appeal from St. Louis court of appeals.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of appeals rendered, be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution.

(Opinion filed.)

Which said opinion is in the words and figures following, to wit:

43 *Opinion of the Court.*

In the Supreme Court. October Term, 1885.

THE MERCHANTS' INSURANCE CO., Resp.,
vs.
BRITTON A. HILL, App'l't.

This is an appeal from the St. Louis court of appeals affirming the judgment of the circuit court, by which an execution was awarded

against the defendant for the amount found to be unpaid upon stock by him held in the Excelsior Insurance Company, and against which the plaintiff had obtained judgment.

Defendant contends that section 736 R. S., by authority of which the execution was awarded, does not apply to stockholders of that corporation, and if in terms it does, then it is unconstitutional, because the law is retrospective and impairs the obligation of contract. The Excelsior Insurance Co. was created by the act of Feb. 9, 1859 (Acts of 1859, p. 74), with such rights, privileges, and restrictions as were conferred upon the Washington Ins. Co. by the act of March 3, 1857, with the exception of so much of section 8 of said act as declares the same to be a public act and exempts said corporation from the operation of sec. 18, art. 1, of the general laws of 1855 concerning corporations. Sec. 8 of the act creating the Washington Ins. Co. (Acts of '57, p. 545) declares that that corporation shall be exempted from the operation of sections 7, 13, 14, 15, 16, & 18 of art. 1 of the general laws of 1855 concerning corporations, and said sections shall be deemed repealed so far as concerns the corporation hereby established. These sections, 7 and 13 to 16, are therefore to be regarded as repealed as to the Excelsior Ins. Co. and not applicable to it. The 7th provides that the charter of every corporation shall be subject to amendment and repeal by the Legislature. The 13th created what is known as the double liability of stockholders in favor of creditors, "unless otherwise specified in their charters," and provides that the property of every stock-
44 holder "shall be liable to be taken on execution to an additional amount equal to that of the amount of his stock and no more for all debts of the corporation contracted during his ownership of such stock," etc. This and the other sections in substance provide that the officer having the execution shall first certify that he can find no corporate property, then give forty-eight hours' notice to the stockholder, when he may levy upon the property of the latter unless he disclose corporate property. After such demand and notice the creditor is also given at his election an action against the stockholder. Now, sec. 736 R. S. is substantially the same as sec. II, p. 328, G. S. 1865, the effect of which is that upon a *nulla bona* return to an execution against a corporation execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock by order of the court upon motion filed in open court and after sufficient notice. This section is without restriction, and applies to any corporation and to any stockholder. It points out a procedure essentially different from that given by those sections of the general laws of 1855, the prevailing feature of which was to create the additional liability to creditors and to give the remedy therefor. Whether under those sections the creditor could or could not reach an unpaid balance due upon the stock subscription to the corporation we do not regard as essential to determine in this case. The statute of 1865 is practically a new one, and, in view of the constitutional and legislative enactments passed since this corporation was created upon the subject of the liability of stockholders, we have no doubt but it applies in terms to the stockholders

of the Excelsior Ins. Co. If the charter of that corporation pointed out any proceeding by which the creditor could reach the balance actually due upon the stock when the corporation became
45 insolvent we should halt before coming to the conclusion before expressed, but regarding those sections of the general laws of 1855 as repealed, so far as this corporation is concerned, there is nothing in the statute of 1865 and 1879 inconsistent with the charter, and we do not regard the authorities cited as having any direct bearing upon the question, though the Excelsior Ins. Co. was created by a special and private act.

2. This section II of the G. S. 1865 was passed and became a law March 19th, 1866 (Laws of 1865–'6, pp. 20 to 70). Defendant subscribed for the stock in question in the following July. It is difficult to see how it can be said to be retrospective or how it impairs the obligation of the contract. Even if the defendant is to be placed upon the same basis in this respect as those who subscribed for stock in 1879, when the corporation was created, the result must be the same, for the statute creates no new or additional liability or burden. The stockholder's indebtedness is not in the least increased either to the corporation or to the creditor. The amount unpaid was at all times a part of the assets of the corporation and properly applicable to the payment of its debts. The most that can be said is that the statute creates a supplementary proceeding available to the creditor against a single stockholder, whereas without it the creditor must resort to an original proceeding against the solvent stockholders of whom the court could acquire jurisdiction. By all this the stockholder may lose some advantages, such as delays and the immediate distribution of the debt among other solvent stockholders, but these results are mere incidents to the change in the remedy and in which he has no vested right. It is competent for the Legislature to thus change the remedy. Tennessee *vs.* Sneed, 96 U. S., 69; Terry *vs.* Anderson, 95 U. S., 628; Springfield *vs.* Commissioners, 6 Pick., 508; Ellis *vs.* Jones, 51 Mo., 181; Porter *vs.* Mariner, 50 Mo., 364.
46 This remedy here is distinct enough from the right; a critical examination of the authorities is not called for.

3. Under the ruling in Eyerman *vs.* Blaksley, 78 Mo., 145, these are the only questions which can be considered in this court, as the amount involved is less than twenty-five hundred dollars.

Affirmed. All the judges concur.

F. M. BLACK, *J.*

47 And afterwards, to wit, at the same term and on the 6th day of November, the following further proceedings were had in said cause, to wit:

W. E. & Cit. & Bond F'l'd. Sup. Gr'ted.

At Chambers, Nov. 6th, 1885.

THE MERCHANTS' INS. CO., Resp.,

vs.

THE EXCELSIOR INS. CO., B. A. HILL, Stockholder, App.

App. from St. L. C't of App'ls.

This day there is presented to the Honorable John W. Henry, chief justice, at chambers, a writ of error to reverse the judgment in the above cause; a citation, directed to the said respondent, citing and admonishing it to be and appear at a supreme court of the United States on the second Monday of October next; also a supersedeas bond in the sum of six thousand dollars; which said writ of error is allowed, said citation signed, and bond approved and ordered to be filed and made a part of the record herein; and thereupon it is further ordered that a supersedeas be granted staying all further proceedings upon the judgment herein until the determination of this cause in the Supreme Court of the United States.

48 *Bond.*

Know all men by these presents that we, Britton A. Hill, as principal, and Melvin L. Gray and William Preston Hill, as sureties, are held and firmly bound unto The Merchants' Mutual Insurance Company in the full and just sum of six thousand dollars, to be paid to the said Merchants' Mutual Insurance Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of November, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at the October term, A. D. 1885, of the supreme court of the State of Missouri, in a suit depending in said court between The Merchants' Mutual Insurance Company, respondent, and Britton A. Hill, stockholder in Excelsior Insurance Company, appellant, judgment was rendered against the said appellant, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Merchants' Mutual Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Britton A. Hill shall prosecute said writ to effect and answer all

damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

BRITTON A. HILL. [SEAL.]
MELVIN L. GRAY. [SEAL.]
WM. PRESTON HILL. [SEAL.]

Sealed and delivered in presence of—
HENRY H. DENNISON,
As witness to the signatures of Melvin L. Gray and Wm. Preston Hill; and
N. OSCAR GRAY,
As witness to signatures of Wm. P. Hill and M. L. Gray.

Supersedeas awarded and bond approved by—
JNO. W. HENRY,
Chief Justice Supreme Court of Missouri.

49 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

Before me, clerk U. S. circuit court, eastern district of Missouri, personally appeared Wm. Preston Hill, to me well known, who upon oath states that he is worth, over and above all indebtedness, the sum of fifty thousand dollars, and that he owns real property to that amount subject to execution in St. Louis, Missouri, in Audrain Co., Missouri, & in St. Charles, Missouri.

WM. PRESTON HILL.

Subscribed and sworn to before me this 5th day of November, 1885.

[SEAL.] A. P. SELBY, *Clerk.*

UNITED STATES OF AMERICA, } *sct:*
—— *District of* ——, }

Before me, —— ——, personally appeared —— ——, to me well known, who upon oath state- that — worth, over and above — indebtedness, the sum of — dollars, and that — own- real property to that amount subject to execution in —.

—— ——.

Subscribed and sworn to before me this — day of —, 18—.

—— ——.

UNITED STATES OF AMERICA, } *sct:*
Eastern District of Missouri, }

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine. I further certify that said bond is good and sufficient.

Witness my hand this 5th day of November, 1885.

A. P. SELBY,
Clerk U. S. Cir. Court, E. D. Mo.

[Endorsed:] No. —. United States circuit court, *western* district of Missouri. —— —— *vs.* —— ——. Appeal bond. $—. Dated — day of ——, 187–. Filed — day of ——, 187–. —— ——, clerk.

50 *Cl'k's Cert.*

STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 23d day of August, A. D. 1886.

[Seal of the Supreme Court of Missouri.]

HENRY W. EWING, *Clerk*,
By H. Y. SHERWOOD, *Dep. Cl'k.*

Endorsed on cover: Missouri supreme court. No. 804. Britton A. Hill, stockholder in The Excelsior Insurance Company, plaintiff in error, *vs.* The Merchants' Mutual Insurance Company. Filed October 18, 1886.

Copy served on me this 18th Day of Feby, 1890
Everett M. Pattison
Atty for D. E.

Office Supreme Court U.S.
FEB 20 1890
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States.

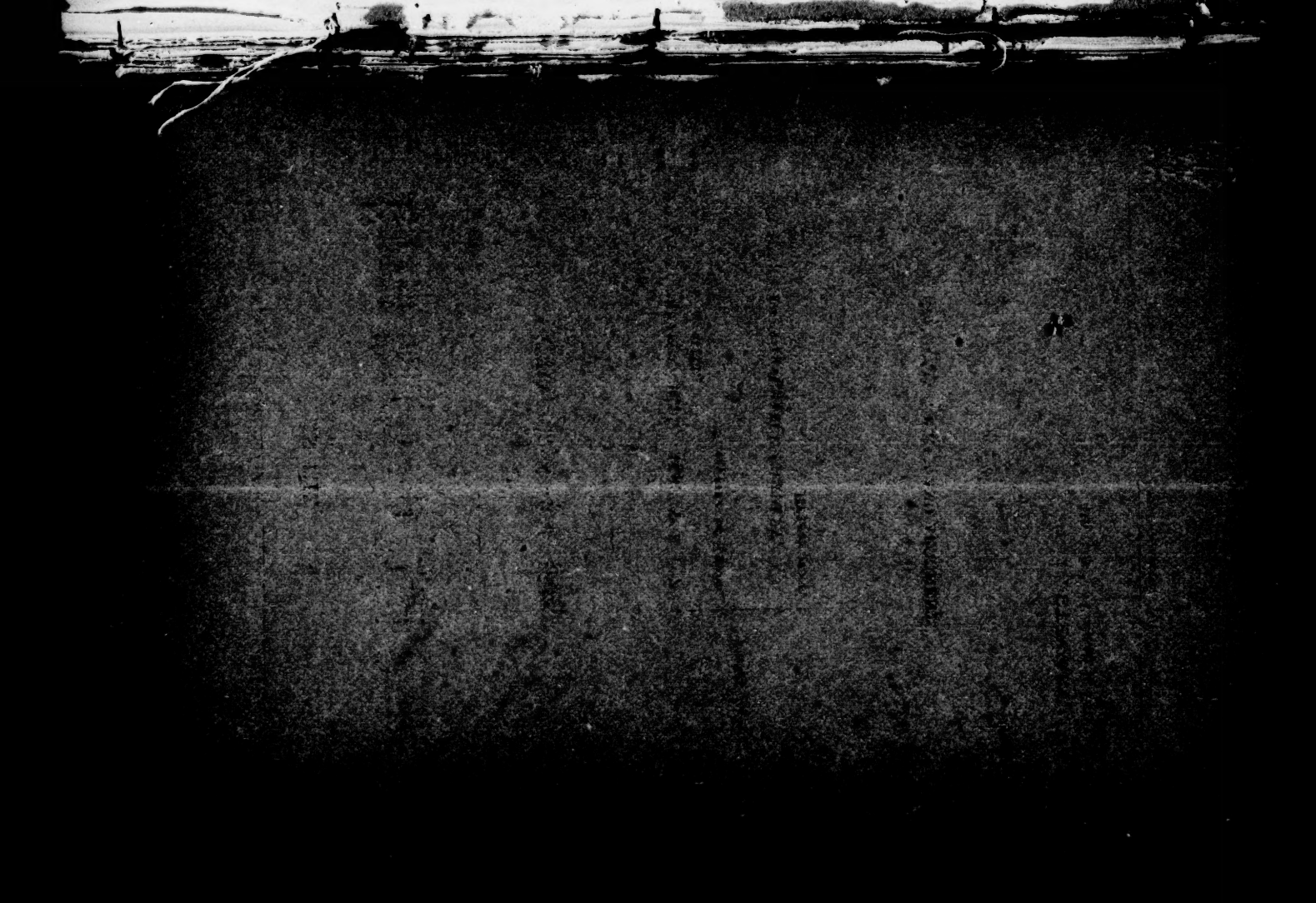
OCTOBER TERM, 1889.

WILLIAM PRESTON HILL, EXECUTOR OF BRITTON A. HILL,
PLAINTIFF IN ERROR,
vs.
THE MERCHANTS INSURANCE COMPANY,
RESPONDENT.
Number 215.

STATEMENT, BRIEF AND ARGUMENT.

G. M. STEWART,
Attorney for Plaintiff in Error.

Nixon-Jones Printing Co., 200-212 Pine St., St. Louis.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM PRESTON HILL, EXECUTOR OF BRITTON A. HILL,
PLAINTIFF IN ERROR,
vs.
THE MERCHANTS INSURANCE COMPANY,
RESPONDENT.

Number 215.

STATEMENT OF PLAINTIFF IN ERROR.

This case is brought to this Court by writ of error to the Supreme Court of Missouri.

The facts which are germain to this appeal and from which this case arises are as follows: On or shortly before the 20th of July, 1866, Britton A. Hill became a subscriber

for 64 shares of the capital stock of the Excelsior Insurance Company of the par value of one hundred dollars per share, and paid one-fourth or 25 per cent. for the same in cash, and gave his stock notes secured to be paid on demand for the residue. In 1872, the Excelsior Insurance Company ceased business, re-insured its risks, and proceeded to wind up its affairs, and in this process Britton A. Hill was called upon to pay an assessment on the notes given by him, which he refused to pay because of a claim which he presented to the Company for professional services. It further appears from the record, pp. 6–7, that in May, 1878, the Merchants Mutual Insurance Company recovered judgment in the Circuit Court of the City of St. Louis against the Excelsior Insurance Company for the sum of $5,653.80 and $73.60 costs with interest at 8 per cent. per annum. Execution was issued on this judgment and returned *nulla bona*, and thereupon in December, 1879, the Merchants Insurance Co., defendant in error, caused a notice to be served on Britton A. Hill under the laws of Missouri Rev. Stat. 1879, Sec. 736, p. 121, as provided for stockholders of corporations who have not paid in full for their stock.

Such proceedings were had on this notice or motion as that a judgment was rendered and execution ordered against Britton A. Hill for the sum of $2,127.50 and costs. In due time the case was taken to the St. Louis Court of Appeals by Britton A. Hill, and the judgment of the trial court was affirmed and it was then taken by the same appellant to the Supreme Court of Missouri with like result. As the law then stood in this State the only questions which the Supreme Court of Missouri could consider

were in effect those now presented to this court. The Supreme Court of Missouri affirmed the judgment of the trial court and of the St. Louis Court of Appeals. Its opinion is in the record as is also that of the St. Louis Court of Appeals. The Excelsior Insurance Company came into existence by virtue of an act of the Legislature of Missouri, approved February 9th, 1859, pp. 74–75 Act of 1859, which reads as follows: —

CHARTER EXCELSIOR INS. CO.

Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. That an insurance company be and is hereby established in the city of St. Louis, to be known by the name and style of the "Excelsior Insurance Company," the stockholders of which are hereby declared a body corporate and politic, with the same amount of capital stock and period of existence and the same rights, privileges, and restrictions as were conferred upon the "Washington Insurance Company" of St. Louis by an act of the General Assembly of the State of Missouri, approved March the third (3), eighteen hundred and fifty-seven (1857), *with the exception of so much of section eight (8) of said act as declares the same a public act and exempts said corporation from the operation of section eighteen (18) of article first (1st)* of the act entitled "An act concerning corporations," approved November the twenty-third (23rd), eighteen hundred and fifty-five (1855).

SEC. 2. James H. Lewis, Henry L. Patterson, Thomas Stern, Morris Collins, James G. Brown, and John C. Porter or any three of them, or such person or persons as they may appoint, are hereby constituted commissioners to open books for subscription to the capital stock, in the

same manner as is prescribed in the charter of said Washington Company. This act to take effect from and after its passage.

Approved February 9, 1859.

The Washington Insurance Company referred to in the foregoing act was created by an act of the Legislature approved March 3d, 1857, and is found on pp. 544, 545, 546, 547, of the acts of the Legislature of Missouri, 1857. Section 8, of the above act incorporating the Washington Insurance Company is as follows:—

"This act shall be and the same is hereby declared *a public act*, and the same shall be deemed and construed as such; and the corporation established by this act shall be, and the same is hereby exempted from the operation of sections *seven*, *thirteen*, *fourteen*, *fifteen*, *sixteen*, and *eighteen*, of article first of the act entitled "An act concerning Corporations," approved November 23, 1855; and said sections shall be deemed as repealed, so far as the same concerns the corporation hereby established."

The sections of the "Act concerning corporations," approved November 23rd, 1855, and which are referred to in the foregoing sect. 8 of the act incorporating the Washington Ins. Co., and from the operation of which the Excelsior Ins. Co. was especially exempted, are as follows: —

Sec. 7. The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature.

Sec. 13. In all corporations hereafter created by the

Legislature, *unless otherwise specified in their charter*, in case of deficiency of corporate property, or estate liable to execution, the individual property, rights and credits of every member of the copartnership, or body politic, having a share or shares therein, shall be liable to be taken on execution, to an additional amount, equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock; and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation, and for the term of six months, after judgment recovered against such corporation, in any suit commenced within the year aforesaid; provided, That in every such case, the officer holding the execution shall first ascertain and certify upon such execution, that he cannot find corporate property or estate.

SEC. 14. In such case, the officer may cause the property of such stockholder to be levied upon by execution in the same manner as if the same were against him individually, after giving him forty-eight hours' previous notice of his intention, and the amount of the debt or deficiency, if he reside within the county, or, if not within the county to his agent, if he have any within the county, otherwise to the clerk or cashier, or some other officer of the corporation, unless such stockholder, his agent or the clerk, or other officer on demand and notice as aforesaid, shall disclose and show to the execution creditor, or the said officer, corporate property or estate, subject to execution, sufficient to satisfy said execution and all fees.

SEC. 15. Such creditor, after demand and notice as mentioned in the preceding section, at his election, may have an action against any such stockholder or stockholders, on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover

of him, or them, individually, the amount of his execution and costs, or of the deficiency as aforesaid, not exceeding the amount of the stock held by such stockholder or stockholders.

SEC. 16. The clerk, or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence (so far as to him known), and the amount of liability of every person liable, as aforesaid. See Rev. Stat. Mo. 1855, pp. 372–373.

In 1866 the Legislature of Missouri amended Sec. 13 of the act of 1855 so as to make it read as follows: —

SEC. 11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; PROVIDED ALWAYS, that no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly. See Sec. 11, Chap. 62, Rev. Stat. Mo. 1866, p. 328."

This act went into effect March 19, 1866.

This law was passed as amended, to give effect to Sec. 6, Article 8, of the Constitution of 1864, providing for *double liability* of the stockholder. pp. 39, 40, Rev Stat. Mo. 1866.

In 1879 the statutes of Missouri were again revised and

Section 11, Chap. 62, Rev. Stat. 1866, *supra*, was amended so as to read as follows: —

SEC. 736. "EXECUTION MAY ISSUE AGAINST STOCKHOLDERS, WHEN. — If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; and, provided, further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned. (G. S. 328, Sec. 11, amended.)"

See Rev. Stat. Mo. 1879, Sec. 736, p. 121.

It was under this latter section that defendant in error claimed and now claims the right to maintain this proceeding. The provision of the charter under which appellant subscribed for his stock is as follows: —

Session Acts, of Mo., March 3rd, 1857; p. 554; creating the Washington Insurance Co.

SEC. 2. * * * "At the time of subscribing, there shall be paid on each share one dollar, and nine dollars more within twenty days after the first election of directors; if any stockholder fails to make such payment, such

stockholder shall forfeit the amount paid on such stock at the time of subscribing; the balance due on each share shall be SUBJECT TO THE CALL OF DIRECTORS, and the said company shall not be authorized to make any policy or contract of insurance, until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand, by approved notes or mortgages on real estate."

These are the substantial facts which come before this court in deciding the questions presented by the record.

RECAPITULATION.

Summarized they are as follows: —

I.

The act creating the Excelsior Insurance Company was a *private act*.

II.

Its charter was specially exempt from all future legislation as to its alteration, suspension or repeal.

III.

Its stockholders were specially exempted from a levy of execution on their individual property at the instance of a judgment creditor of the corporation in case of a deficiency of corporate property or from actions at law by creditors.

IV.

That the charter of the Excelsior Insurance Company being a private act and exempted from legislative control, the

rights of its stockholders were not affected by any subsequent legislation of a general nature, and plaintiff in error was not subject to the process invoked in this case.

V.

The method of collecting any unpaid stock is specially provided for in the charter and is *exclusive* of any other remedy unless that of a court of equity.

ERROR ASSIGNED.

The error is assigned as follows: —

That when the plaintiff in error purchased his stock of the Excelsior Ins. Co., he entered into a contractual relation not only with the Ins. Company but with the State of Missouri, as to the method of paying his stock, and also as to the limitations as to the extent of such liability and that the rights which by this contract became vested in him has been taken away by the decision of the court of Missouri giving the act of 1879 of the legislature retroactive effect and the obligation of this contract has thus been impaired.

ARGUMENT.

I.

The constitution of the State of Missouri of 1875, Sec. 15 of Article 2, provides: "That no * * * law impairing the obligation of contracts or retrospective in its operation, etc., can be passed by the general assembly."

The same provision is found in the constitution or Bill of Rights of 1864, Art. 1, Sec. 28.

The question as to whether the general laws contained in the Revised Statutes of Mo. of 1866 and 1879 referring to issuing executions against stockholders above cited were intended to apply to the *special* or *private* statute, under which the Excelsior Ins. Co. was incorporated was, we assume, a matter for the Supreme Court of Missouri to finally determine and is not before this Court for consideration, save as such application of these general statutes may affect the questions directly presented to this Court.

Assuming therefore that these general acts were intended to be applicable to the stockholders of this private corporation the question arises: —

I.

Are they retroactive in their operation.

II.

Do they impair the obligation of the contract between plaintiff and the insurance company.

With respect of the first proposition it is to be borne in mind that Britton A. Hill subscribed for his stock in this Insurance Co. on or before July 20th, 1866, probably July 11, 1866 (p. 6 of record), as he gave one note of that date in payment of same, at that date the general act of the general assembly of 1855 as above quoted had been amended by the act of March 19, 1866, also above quoted. The act of 1855, as we have seen, stood repealed as to the Excelsior Ins. Co. and as the act of 1866 was only an amendment to this act, (see marginal note to § 11, act 1866, *supra*,) providing another method of enforcing the double liability clause of the constitution of 1864, it in no way affected the stockholders of Excelsior Ins. Co. Under Section 11 of the act of 1866 the provision for execution is for the amount unpaid on the original subscription and also for an additional amount equal to such subscription. In other words the act of 1866, Section 11, only provided for execution when there was what is called double liability or for the unpaid subscription and an additional amount equal to the original subscription. It is unnecessary to argue that plaintiff in error is exempt from any such liability by the express provisions of its charter, or from process provided by the statute of 1866. By this act, therefore, no new remedy was provided whereby plaintiff in error could be subjected to the process now invoked. It is scarcely necessary to argue that plaintiff in error could not be held liable under the constitution of 1864 or the act of 1866 for twice the amount of his subscription as therein provided. This seems to be conceded as the motion for execution filed in this case does not so request.

It is manifest therefore that when plaintiff in error subscribed for his stock there was as to his corporation no law in Missouri, which permitted a creditor to sue him at law in any form as has been attempted in this case. It is also to be noted that the charter of the Excelsior Co. does not make the unpaid portion of the subscribed stock of the company a debt due it for which it can sue at will. Plaintiff in error was not an original subscriber and hence was under no such obligation as were the original subscribers to pay their stock in full before any policy of insurance could issue. Sec. 2 of act incorporating Washington Ins. Co., Laws of Missouri 1857, p. 544.

It is evident from the record that he was to pay only as the needs of the company might require, (see page 9 of record), and then by way of assessments by the Company on his stock notes.

Under the law as it stood when plaintiff in error subscribed for his stock, a creditor of the Excelsior Insurance Co., if there was an insufficiency of corporate property, had no action at law against a stockholder. His remedy was in equity in behalf of himself and other creditors who might join him. In such case the stockholder or stockholders so impleaded would have had the right by answer, or cross-bill or both to have all the other stockholders who were subject to assessments brought into Court and their respective liabilities determined, because in the case at bar, when and long before this process was issued the Excelsior Insurance Company was in liquidation. See page 6 of record.

As before stated the act of 1866 and 1879, were amendments to the statute of 1855, from the operation of which

the Excelsior Ins. Co. was specially exempted, and which as to that corporation stood repealed.

There can then be no question but that the act of 1866 and 1879, as they have been applied to plaintiff in error are retroactive.

In Fairchild *v.* Hunt, 71 Mo. 434, it was expressly decided, in reference to these very sections of the Revised Statutes of 1855, 1865 and 1879, that when a revision includes a previous law, it is only thereby intended to continue it in force, and not to make it operate as an original act to take effect from the date of the revised law, and that sec. 11, of the Act of 1865, could not retroact so as to affect Mrs. Hunt, a stockholder under a charter of 1853.

This fact is apparently conceded, but it has been argued by counsel and by the courts below, that it is harmless inasmuch as these statutes were only remedial, and did not prejudice the contractual rights of plaintiff in error. This argument leads to the second point, namely: —

Do these statutes under which plaintiff in error has been subjected to the summary process invoked in this proceeding impair the obligation of the contract, made when he subscribed for his stock? In answer to this we say: —

I.

That by its charter the Excelsior Insurance Company was exempted from Sec. 7, Chap. 34, Rev. Stat. 1855, p. 37, which provided that the charter of every corporation which should *thereafter* be granted should be subject to legislative control. The plain meaning of this provision is that no

subsequent legislation could affect the charter rights of this corporation. Of these, one was that a stockholder should not be subject to the summary process invoked in this case. Another that when called upon to pay his *pro rata* share of the indebtedness of the company, when in liquidation, the amount he should pay would be determined by the proportion which the total amount of the unpaid stock due from solvent holders bore to the total indebtedness of the company.

In the court below it was argued that by his subscription to the capital stock of the Excelsior Insurance Company, the appellant agreed absolutely to pay the full amount of his subscription, and hence he cannot complain that he has been forced to pay it by this proceeding.

With all due respect to the lower court; we submit that a subscriber to the capital stock of this corporation did not unconditionally agree to pay the full amount of his subscription, nor is such the inflexible rule of law.

It is true, he becomes LIABLE, under certain contingencies, to pay the same in full, but this is only when the necessities of the corporate business require that each shareholder shall pay the full amount of his subscription.

This is especially true where the enterprise has been abandoned as in the case at bar. In such case there is no use for capital except for winding up the company's business.

If there are no unpaid creditors, the liability of a member of the company to contribute his share of the capital would, by the implied terms of his contract, have ceased.

If, however, there are debts of the corporation to be

paid, then each shareholder agrees to contribute or pay upon his unpaid stock his *pro rata* share of such indebtedness, and, when this is paid, his liability is at an end.

Morawetz Priv. Corp., 2nd ed., pp. 151, 152, 153.

This proposition as stated by this eminent author appears so just and equitable and appeals so forcibly to the common sense of reasoning men that it would not seem necessary for adjudications to imprint it upon the understanding and judgment. Another proposition is stated by the State courts to wit: that the exemption from the operation of certain statutes named or referred to in the charter of the Excelsior Ins. Co. had reference only to the "double liability" provision and not to the remedy provided, to wit: the seizure of the stockholder's property by execution without a trial to which he was a party. This is an evident misapprehension of the sections of the statute from the operation of which the stockholders of the Excelsior Ins. Co. were exempted.

As to these stockholders the liability and the remedy for delinquency created by this statute, were abrogated and the statutes were repealed, and the corporation by express terms placed beyond future legislative control, so that when plaintiff in error subscribed for his stock in July, 1866, his contractual rights and the remedies which could be invoked against him as a stockholder were in all respects the same as they stood at common law, and these rights were specially valuable to him when the company went into liquidation in 1872. What these rights were are concisely stated by the author last above cited.

The law creating this corporation therefore should be read as if in express terms there had been embodied into it this language: —

"In the event that this corporation shall become insolvent or shall go into liquidation the liability of each stockholder for unpaid stock, shall bear the same proportion to the entire indebtedness of this corporation that his unpaid stock bears to the entire assets, including all unpaid stock held by solvent persons and such liability shall be determined only by a proceeding in chancery."

It must be presumed that when this charter was granted and these special exemptions from the summary process by of way execution, future legislative control, and in declaring the charter a *private* act, that the legislature had specially in view the fact that the corporation and its stockholders would stand, and it was intended they should stand in the attitude that the common law placed them. This court has decided that the remedy subsisting when a contract was made, is a part of the obligation and any subsequent law of the State, which so affects that remedy as substantially to impair or lessen the value of that contract is forbidden by the constitution of the United States.

Edwards *v.* Kearzy, 96 U. S. 595;
Siebert *v.* Lewis, 122 U. S. 284, 294;
Denny *v.* Bennett, 128 U. S. 489–494, 495.

This court has also held that the remedy provided by the charter of a corporation is the only remedy that can be

applied in recovering from a stockholder for his unpaid stock.

Pollard *v.* Bailey, 20 Wall. 520;
Terry *v.* Tubman, 92 U. S. 156;
Horner *v.* Henning et al., 93 U. S. 228;
Fourth Nat. Bank of N. Y. *v.* Francklyn, 120 U. S. 747.

The proceeding in the case at bar was such that plaintiff in error could interpose no pleadings. The only defense possible to him was to show the amount unpaid on his stock, but he could not show that under the contract made when he subscribed for the stock he was only liable for his *pro rata* share. In other words, he was denied the right to show the total indebtedness of the company, or the amount of unpaid stock held by solvent stockholders and thus establish the extent of his liability. He could not even show that there were available corporate assets to pay the debt of defendant in error.

The sole inquiry was, by the statute invoked against him, "How much of your stock remains unpaid?" and this notwithstanding the fact that under his contract he was as this court has stated, Pollard *v.* Bailey, *supra*, 525, liable to "pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital and is not required to pay more." Scovill *v.* Thayer, 105 U. S. 143–155. The assets of the corporation could not be ascertained in this inquiry, nor its liability be determined. The equities of the respective parties creditors and stockholders could not be investigated, nor the proper measure

of any shareholder's liability equitably ascertained and adjudged. These are material to a stockholder who has subscribed to the capital stock under such a charter as this, and they cannot be taken from him.

It will not be contended that the Legislature had no purpose in exempting the shareholders of this corporation from the summary remedies given by the Statutes of 1855, and bestowing upon them the rights and immunities which equity gave them. Nor can it be successfully argued that in subscribing for this stock the party now sought to be held, did not know the nature and the measure of his liability.

It would be as logical to argue that if one incur a liability when the statute provides that the rate of interest to be paid on the same was six per cent. per annum, should be afterwards asked to pay ten per cent. upon the same, by virtue of a subsequent Statute, calling for the latter amount on all such liabilities.

In this connection we also cite the language employed by eminent counsel in his brief in the courts below, and who has since retired from practice. (Judge Nathaniel Holmes.)

"Such a construction of these general laws of 1865 and 1879 as would make them apply to this special and private act, and subject the stockholders of this corporation to this summary proceeding on motion would make those laws unconstitutional, as being retroactive, and as depriving those stockholders of rights and defenses which they before had, and as imposing on them liabilities to which they were not subject, when they became stockholders under the rights, privileges and exemptions conferred on them by the special charter; and it is a settled principle that a construction

which would make an act unconstitutional will not be given to it, unless it in clear and express terms admit of no other rational explanation."

Hope Mut. Ins. Co. *v.* Flynn, 38 Mo. 483;
Prov. Sav. Inst. *v.* Bathing Rink, 52 Mo. 557;
Fairchild *v.* Hunt, 71 Mo. 531–2;
Woart *v.* Winnick, 3 N. H. 477;
Society *v.* Wheeler, 2 Gall. 105–139;
Sedgw. *v.* Stat. & Const. Law, 188;
Smith Stat. & Const. Law, §§ 149, 157, 172; 368, 533;
Const. of Mo. of 1865, Art. I., § 28 (G. S. 1865, p. 23); and Const. of Mo. of 1875, Art. II., § 15 (R. S. 1875, p. LVI.); no retrospective law can be passed.

"These authorities show that a subsequent act, which impairs rights acquired, or creates new grounds of action, or takes away defenses had under existing laws, or imposes new liabilities in respect of transactions already past, and has thus a retrospective operation on vested rights, is unconstitutional, both under the Constitution of this State and under the Constitution of the United States, Art. I., § 10.

Smith's Stat. & Const. Law, § 248–252, § 254–255, *et seq.*

"At common law, and independently of these general statutes, no action would lie by a creditor of the corporation against a stockholder, because there was no privity of contract between them, though in equity he could have a bill against all or some of the stockholders of an insolvent corporation, upon an equity worked out through the liabil-

ity of the corporation to him and of the stockholders to the corporation for a balance of unpaid stock, by a species of subrogation, to compel them to contribute their *pro rata* shares (within the amounts owed by them) towards making up the amount of the creditor's demand against the corporation, in which an account could be taken, and claims of set-off and other equitable defenses could be adjusted, and an apportionment made of the common burden among all the defendants.

Lionberger, Assignee, etc., *v.* Broadway Savings Bank, 10 Mo. App. 499;
Vose *v* Grant, 15 Mass. 505;
Spear *v* Grant, 16 Mass. 15;
Wood *v* Dummer, 3 Mason, 308;
Briggs *v.* Penniman, 8 Cow. 387;
Hume *v.* Winyan, 1 Car. L. Jour. 217;
Nathan *v.* Whitlock, 9 Pai. Ch. 152;
Mann *v.* Pentz, 3 N. Y. (Comst.) 422.

"These cases show that this defendant, under the special charter of 1859, and independent of these general laws, could have been sued only in equity, upon a bill filed against all the solvent stockholders owing unpaid balances of stock, within the jurisdiction of the court, and subjected to the payment of his *pro rata* contribution towards making up the amount of the plaintiff's claim only, and no more.

"But, if these general laws are held to be applicable to this corporation, then, on this proceeding by motion, the stockholder would be subjected to a several liability to the plaintiff for the whole amount of his unpaid stock, without any remedy over against the other stockholders for a contribution of their respective shares, the statute proceeding being against the stockholders severally, and not jointly.

"Andrews *v.* Callender, 13 Pick. 484–490; where the

liability under the statute is several, and not joint, there is no contribution from the other members.

"It thus clearly appears that, under this construction, the stockholders would be subjected to a new liability by a retrospective operation of the General Statutes of 1865 and 1879.

"Smith's Stat. & Const. Law, § 368 (p. 531); no new ground for the support of an action can be created, nor any existing ground of defense be taken away, by a subsequent act; and (§ 533, p. 679) "an act is not to be construed as having a retroactive effect, unless it clearly appear that it was so intended, and not even then, if such a construction would make it divest vested rights."

"3. Nor can it make any difference that this defendant became a subscriber after the revised act of 1865 went into effect, and for the reason that he would have the right to presume that as a subscriber under this special charter of 1859 he would be entitled to all the rights, privileges and exemptions conferred by it, and that the revised section of the general laws of 1865 would have no application to this corporation.

"If these positions be sound, they are at once decisive of the whole case here; for it necessarily follows that this defendant was not subject at all to this proceeding on mo ion."

The case of Hatch *v.* Dana, 101 U. S. 205, does not militate against this position. In that case a bill in equity was brought to enforce a demand against an insolvent corporation against several, but not all of the stockholders, and in answer to a complaint made, on appeal, that all should be joined, this Court said that this was not necessary, inasmuch as those stockholders who were impleaded could secure the necessary protection by applying for a receiver, or by filing cross-bill they might have obtained a discovery

of the other stockholders, brought them in and enforced contribution from all who had not paid their stock subscription. In the proceeding invoked in the case at bar, plaintiff in error was deprived of all these rights, and it is that of which we complain, and which we insist was guaranteed to him by the charter of his corporation, and of which he could not be legally deprived by subsequent legislation.

The record is necessarily barren of facts respecting the financial condition of the company when it went into liquidation in 1872. The record at page 10 however does show, that at that time an assessment of from ten to fifteen per cent. would have met all demands against the company. Assuming this to be true, as we must for the purposes of this case, plaintiff in error is asked to pay eighty-five per cent. in excess of his legal liability as fixed by his contract, and that because of the law of 1879 which so changes the remedy in such cases as to deprive him of its benefits.

We respectfully submit therefore that the judgment of the Supreme Court should be reversed and the case dismissed.

G. M. STEWART,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

BRITTON A. HILL'S EXECUTOR,
Plaintiff in Error,
vs.
THE MERCHANTS' MUTUAL INSURANCE COMPANY,

No. 215.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT AND ARGUMENT BY DEFENDANT IN ERROR.

EVERETT W. PATTISON,
Attorney for Defendant in Error.

Nixon-Jones Printing Co., 200-212 Pine St., St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

BRITTON A. HILL'S EXECUTOR,
Plaintiff in Error,

vs.

THE MERCHANTS' MUTUAL INSURANCE COMPANY,
Defendant in Error.

} *No. 215.*

IN ERROR TO THE SUPREME COURT OF MISSOURI.

STATEMENT BY DEFENDANT IN ERROR.

Defendant in error, The Merchants' Mutual Insurance Company, recovered judgment in the St. Louis Circuit Court against the Excelsior Insurance Company for $ 5,255.27. Plaintiff in error, Britton A. Hill, was a stock-

holder of the Excelsior Insurance Company, having subscribed for his stock in July, 1866. At the time of the rendition of this judgment, there was a statutory provision in force in the State of Missouri, being section 736 of the revised statutes of 1879. That section reads as follows: —

"If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the *unpaid balance* of such stock by him or her owned; provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; and, provided further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned."

This became a law, substantially in its present shape, on March 19th, 1866, the changes made in the revision of 1879 not being of a character to affect the question involved in this case.

Upon the judgment against the Excelsior Insurance Company execution was issued, and returned *nulla bona*. Thereupon, on December 17, 1879, defendant in error commenced a proceeding under section 736, above set out, to obtain execution against plaintiff in error, alleging that plaintiff in error was the owner of certain shares of the capital stock of the Excelsior of the par value of $100 per share, which had not been fully paid up, and asking that execution issue against plaintiff in error for the unpaid balance on his stock. This proceeding resulted in a finding by the St. Louis Circuit Court that plaintiff in error was the owner of 37 shares of the stock of the Excelsior, of the par value of $100 each, upon which there was an unpaid balance of $2,127.50, and that said Hil

was liable to the execution of plaintiff in said amount. Execution was ordered to issue accordingly.

From this judgment said Hill appealed to the St. Louis Court of Appeals, where the judgment was affirmed; thence to the Supreme Court of Missouri, where the judgment was again affirmed. Hill then sued out a writ or error to the Supreme Court of Missouri, on the ground that the case involved the construction of Section 10, Article I., of the constitution of the United States.

The charter of the Excelsior Insurance Company was simply a re-enactment of a previous charter which had been granted to the Washington Insurance Company. The charter of the Washington Insurance Company can be found in the session acts of Missouri for 1856–7, page 544. By that charter the Washington Insurance Company, and consequently the Excelsior Insurance Company, were exempted from the operation of certain sections of the general corporation law of Missouri, and the charter declares that "said sections shall be deemed *as repealed*, so far as the same concern the corporation hereby established." (See section 8 of the charter.)

Those sections thus repealed are set out in full in the opinion of the St. Louis Court of Appeals, the material part of which opinion will be embraced in this statement. The entire opinion will be found in 12 Mo. App. 148, and the particular sections just referred to will be found on pages 157–8 of the opinion.

The Excelsior was incorporated in 1859, but as it has been above stated, plaintiff in error did not subscribe for his shares until July, 1866. The contention of plaintiff in error is, that as section 736 of the Revised Statutes was not in force in 1859, the date of incorporation of the Excelsior, that section must be deemed a law impairing the obligation of a contract and, therefore, repugnant to Section 10 of article I, of the Federal Constitution, prohibiting States from passing any law impairing the obligation of contracts. The decisions of the State courts were against

plaintiff in error on this point. That part of the opinion of Judge Thompson, of the St. Louis Court of Appeals, relating to this question is as follows:—

"The next point is made by the appellant, and it is that the stockholders of this company are, by the terms of its charter, exempt from this summary proceeding by motion. Recurring to the statement of facts, it will be perceived that the corporation was created by a special charter passed February 9, 1859 (Sess. Acts 1859, p. 74). Section 1 of this act provided: "That an insurance company be, and is hereby established in the city of St. Louis, to be known by the name and style of the "Excelsior Insurance Company," the stockholders of which are hereby declared a body corporate and politic, with the same amount of capital stock and period of existence, and with the same rights, privileges and restrictions as were conferred upon the Washington Insurance Company of St. Louis, by an act of the general assembly of the State of Missouri, approved March 3, 1857, with the exception of so much of section 8 of said act as declares the same a public act, and exempts said corporation from the operation of section 18 of Article I. of the act entitled, 'An act concerning corporations,' approved November 23, 1855."

The provision here referred to in the charter of the Washington Insurance Company is as follows, so far as material: —

"The corporation established by this act shall be, and the same is hereby exempt from the operation of sections 7, 13, 14, 15, 16 and 18 of Article I. of the act entitled, 'An act concerning corporations,' approved November 23, 1855; and said sections shall be *deemed as repealed*, so far as the same concerns the corporation hereby established." Laws 1856–7, p. 545, sect. 8.

The provisions of the act of November 23, 1885, concerning corporations here referred to, from the terms of which the Excelsior Insurance Company was thus exempted, were embodied in the Revised Statutes of 1855, and, so far as material, were as follows: —

"The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." Rev. Stats. 1855, chap. 34, sect. 7.

"In all corporations hereafter created by the legislature, unless otherwise specified in their charter, in case of deficiency of corporate property or estate liable to execution the individual property rights and credits of every member of the copartnership, or body politic, having a share or shares therein, shall be liable to be taken on execution, to an additional amount equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock; and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation, and for the term of six months after judgment recovered against such corporation, in any suit commenced within the year aforesaid: Provided, that in every such case, the officer holding the execution shall first ascertain and certify upon such execution, that he cannot find corporate property or estate." Rev. Stats. 1855, chap. 34, sect. 13.

"In such case, the officer may cause the property of such stockholder to be levied upon, by execution, in the same manner as if the same were against him individually, after giving him forty-eight hours' previous notice of his intention, and the amount of the debt or deficiency, if he reside within the county; or, if not within the county, to his agent if he have any within the county; otherwise to the clerk or cashier, or some other officer of the corporation, unless such stockholder, his agent, or the clerk, or other officer, on demand and notice as aforesaid, shall disclose and show to the execution creditor, or the said officer, corporate property or estate, subject to execution, sufficient to satisfy said execution and all fees." Rev. Stats. 1855, chap. 34, sect. 14.

"Such creditor, after demand and notice, as mentioned in the preceding section, at his election, may have action against any such stockholder or stockholders, on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover of him, or them, individually, the amount of his execution and costs, or of the deficiency as aforesaid, not exceeding the amount of the stock held by such stockholder or stockholders." Rev. Stats. 1855, chap. 34, sect. 15.

It will be perceived that this statute falls within that class of statutes which create a liability and prescribe a remedy for its enforcement. It created what was known in

this state as a "double liability," and prescribed a remedy to enforce it. It related solely to this superadded liability. It had no reference to what may be called the stockholder's common-law liability — the liability which he assumes by contract, and which is generally worked out for the benefit of the creditors of the corporation by the process furnished by courts of equity. Irrespective of this statute, every stockholder in the Excelsior Insurance Company stood liable to pay the amount which he had subscribed to the capital stock of the company, and in the event of the insolvency of the company, he stood liable to pay it to a receiver, to an assignee, or other trustee representing the creditors. It is unnecessary to cite authorities to this proposition. It has been constantly recognized by our Supreme Court, by this court, or by other American courts, state and federal. It proceeds upon the well settled rule that the capital of a corporation is a trust-fund for its creditors, and that, in the event of the insolvency of the corporation, a court of equity will appoint a trustee to collect and administer this fund for their benefit.

What, then, is the effect upon this liability, of the statute of 1879, under which the present proceeding is instituted? Does it operate to impose on the defendant a more onerous liability than that under which he stood by virtue of the charter of the company? Did it change any rule of evidence, so as to render it possible to charge him with liability upon a smaller quantum or lower grade of evidence than would have been necessary before? In short, did it come within any of the definitions of a retrospective law, or a law impairing the obligation of contracts? Or was it a law affecting merely the remedy — the mode of procedure to which a creditor of the corporation might resort, in order to enforce the liability which the defendant had assumed by his contract of subscription?

The statute would seem to have no other effect than to change the creditors' remedy from a protracted and expensive suit in equity, in which all the shareholders, so far as practicable, would have to be made parties, in which all the creditors would be beneficiaries, and in which the whole fund might be eaten up with the costs, to a direct, informal and inexpensive proceeding against any stockholders whom the creditor might chance to find who had not paid into the capital stock of the debtor corporation the amount which he had agreed to pay in his contract of subscription. We

cannot see wherein the liability of the stockholders is made more onerous by the remedy afforded by the Revised Statutes, although it is reached and enforced more quickly, and with less expense to the creditor.

The learned counsel for the defendant suggests that his liability is rendered more onerous in this, that independently of the general law, his liability could only be enforced in equity upon a bill filled against all the solvent stockholders owning unpaid balances of stock, within the jurisdiction of the court, in which proceeding he would be liable to pay his *pro rata* contribution towards making up the amount of the plainiiff's demand, and no more. Whereas, he argues that the effect of this proceeding by motion given by the general law, is to subject him to a several liability to the plaintiff for the whole amount of his unpaid stock, without giving him any remedy over against other stockholders for a contribution in respect of their shares,—the statute proceeding being against the stockholders severally, and not jointly. If this were the effect of the general law, we should not hesitate to hold that it could not operate upon the present charter without substantially impairing the rights of the shareholders of this company, and coming within the constitutional inhibition against retrospective laws, and laws impairing the obligations of contracts. But we do not think it can be held to have such an operation. The case of *Andrews* v. *Callender* (13 Pick. 484), to which the learned counsel refers as supporting this view, is certainly an unsatisfactory case. In so far as it holds that the members of a corporation who are made by statute jointly and severally liable to pay the debts of the corporation, cannot have contribution against each other for the purpose of equalizing their burdens, because the statute which creates the liability does not provide for contribution, I am free to say that I do not think it can be vindicated on sound principles. The statute there in question made the members of the corporation liable substantially as partners, and the right which partners have as among themselves, to have their common burdens equalized, would follow, on the plainest principles of justice, without the statute so providing. It has been held that a stockholder who has been compelled to pay a debt of the corporation, may maintain an action for contribution against all the stockholders, who were such at the time of the contracting of the debt, although the

stockholders are liable severally under the statute. *Aspinwall v. Tarrance*, 1 Lans. 381. It was so held in *Judson v. Rossie Galena Company* (9 Page, 598), where the liability was joint and several. So it is said in another case by Denio, J.: "If a stockholder is sued to enforce his individual liability, he may resort to a suit for an account and contribution." *Garrison v. Howe*, 17 N. Y. 458. See also *Stewart v. Lay*, 45 Iowa, 614. So under statutes where the liability of the stockholders is similar to that of partners, it is said that "they should be left to such remedies as have been provided by law for the adjustment of partnership transactions. They may go into chancery for an account, and to have the claims of all parties settled upon an equitable principle." Bronson, J., in *Bailey v. Buckner*, 3 Hill, 188. And see *Allen v. Sewall*, 2 Wend. 327; *Moss v. Oakley*, 2 Hill, 269; *Farrow v. Bivings*, 13 Rich. Eq. 25.

But if the case of *Andrews v. Callender* (*supra*) were to be regarded as sound, it would still not be an authority for the position here contended for; and for the very reason on which that case was decided, that the liability there in question was a statutory liability, while here we are dealing only with the liability which the principles of equity attach to the subscriber's contract. No reason has been suggested, and we can see none in the nature of things, why the giving by the legislature of the direct and inexpensive remedy by motion should be construed to deprive the shareholder thus proceeded against of his right of contribution against his fellow-shareholders. The only change which we can perceive in the nature of the remedy is this: under the proceeding in equity, the labor, delay, and perhaps the expense of securing to shareholders the equalization of their burdens as among themselves, falls upon the moving creditor, who is not benefited by it; whereas, under the statutory remedy, it falls upon the shareholder who is benefited by it. Such a change of remedies, we are clear, is not so extensive as to fall within any constitutional inhibition.

The question thus seems clear upon principle; but there are not wanting authorities in support of the conclusion at which we have arrived. The cases of *Stanley* v. *Stanley* (26 Me. 191), and *Marcy* v. *Clark* (17 Mass. 334), which hold that it is competent for the legislature to pass a law making the private property of the stockholders of existing

corporations liable to be taken in execution for debts of such corporations thereafter contracted, such liability not existing before, go much further than we go in this case. They apply to the case of this defendant in this respect; that he became a shareholder in this corporation after the Revised Statutes of 1865, which first gave the present remedy by motion, went into effect. These cases, however, are not well reasoned, and it is not necessary that we should commit ourselves to the doctrine which they lay down. Other cases, though not directly in point, furnish more persuasive analogies. Although the right of the creditors of a corporation to the security afforded by the liability under which its stockholders stand by the laws existing at the time of the contracting of his debt, is in the nature of a contract, and cannot be impaired by subsequent legislation (*Hawthorne* v. *Calef*, 2 Wall. 10); yet statutes which give the right to arrest and imprison a stockholder for a debt due the corporation (*Penniman's Case*, 11 R. I. 333), and statutes which drive such a creditor from a direct proceeding by suit at law against any individual stockholder to a general proceeding in equity brought by a trustee in behalf of all creditors against all stockholders (*Story* v. *Furman*, 25 N. Y. 214; *The Commonwealth* v. *Cochituate Bank*, 3 Allen, 42), do not impair the obligation of the corporation's contract, but affect the remedy merely, and are hence not unconstitutional. The rule of the latter cases ought to work both ways. If the present remedy by motion had been the only remedy existing at the time this plaintiff contracted its debt, it would be competent under these decisions, for the legislature to take it wholly away, and substitute a remedy in equity; and the plaintiff could not complain, for he would have a substantive, though not as cheap and speedy a remedy left. So this defendant cannot complain that the remedy against him is so far changed that he must seek his remedy for contribution at his own suit and at his own expense, and that the creditor is not bound, as before, to extend to him his remedy for contribution at the same time that he enforces his own right."

The opinion of the Supreme Court of Missouri will be found in 86 Mo. 466 and is as follows, omitting only the brief statement of facts made by the court: —

"This section is without restriction and applies to any corporation and to any stockholder. It points out a procedure essentially different from that given by those sections of the general laws of 1855, the prevailing feature of which was to create the additional liability to creditors, and to give the remedy therefor. Whether under those sections the creditor could, or could not, reach an unpaid balance due upon the stock subscription to the corporation we do not regard as essential to determine in this case. The statute of 1865 is practically a new one and in view of the constitutional and legislative enactments passed since this corporation was created upon the subject of the liability of stockholders, we have no doubt but it applies in terms to the stockholders of the Excelsior Insurance Company. If the charter of that corporation pointed out any proceeding by which the creditor could reach the balance actually due upon the stock when the corporation became insolvent, we should halt before coming to the conclusion before expressed, but regarding those sections of the general laws of 1855 as repealed, so far as this corporation is concerned, there is nothing in the statute of 1865 and 1879 inconsistent with the charter, and we do not regard the authorities cited as having any direct bearing upon the question, though the Excelsior Insurance Company was created by a special and private act.

This section eleven of the General Statutes, 1865, was passed and became a law March 19, 1866 (Laws of 1865–6, pp. 20 to 70), defendant subscribed for the stock in question in the following July. It is difficult to see how it can be said to be retrospective, or how it impairs the obligation of the contract. Even if the defendant is to be placed upon the same basis in this respect as those who subscribed for stock in 1859, when the corporation was created, the result must be the same, for the statute creates no new or additional liability or burden. The stockholder's indebtedness is not, in the least, increased either to the corporation or to the creditor. The amount paid was at all times a part of the assets of the corporation and properly applicable to the payment of its debts. The most that can be said is that the statute creates a supplementary proceeding, available to the creditor against a single stockholder, whereas without it the creditor must resort to an original proceeding against the solvent stockholders of whom the court could acquire jurisdiction. By

all this the stockholders may lose some advantages, such as delays, and the immediate distribution of the debt among other solvent stockholders, but these results are mere incidents to the change in the remedy and in which he has no vested right. It is competent for the legislature to thus change the remedy. *Tennessee* v. *Sneed*, 96 U. S. 69; *Terry* v. *Anderson*, 95 U. S. 628; *Springfield* v. *Commissioners*, 6 Pick, 508; *Ellis* v. *Jones*, 51 Mo. 181; *Porter* v. *Mariner*, 50 Mo. 364. This remedy here is distinct enough from the right, and a critical examination of the authorities is not called for.

Under the ruling in *Eyerman* v. *Blakesley*, 78 Mo. 145, these are the only questions which can be considered in this court, as the amount involved is less than twenty-five hundred dollars."

As stated above, this case is in this court, if it is properly here at all, on writ of error; and there has been filed here what purports to be a transcript of the case. But as there is no return to the writ of error, there is nothing to warrant the court in examining the case, and the writ should be dismissed. (Printed Record, pages 1 and 2.)

But, waiving this technicality, so far as we have the power to do so, it will appear from an inspection of the record, that the constitutional question, which is the only question before this Court, was properly decided by the State Courts.

ARGUMENT BY DEFENDANT IN ERROR.

Before entering upon the discussion of the main point I remark that the question is not whether the State courts erred in their construction of the charter of the Excelsior Insurance Company, or of the statute of 1865 (§ 736, Rev. Stat. of 1879). We are here only concerned to know whether the constitutional question has been properly decided; whether any constitutional right has been denied the plaintiff in error. If no provision of the federal constitution has been violated, the construction placed upon the acts of the legislature by the State courts is conclusive.

> *Commercial Bank* v. *Buckingham*, 5 How. 317, 341; *Lawler* v. *Walker*, 14 *Id.* 149.

The constitutional question raised by plaintiff in error is, that the section of the Missouri statute, under which the Insurance Company recovered judgment against him in the St. Louis Circuit Court, impairs the obligation of a contract.

The first inquiry is, therefore, what is the contract, the obligation of which he claims to be impaired? And the remaining question, in what respect is its obligation lessened?

There are two contracts involved in this record. The first is a contract between the State of Missouri and the corporation known as the Excelsior Insurance Company, the date of which is February 9, 1859. By an act of incorporation of that date the State conferred certain rights on the corporate body then created. It conferred no special rights on the stockholders as such, and there is not a word in the act itself, nor in the act incorporating the Washington Insurance Company, which was made a part of the Ex-

celsior charter, conferring any rights on the stockholders as such. The rights of the stockholder were precisely those, no more and no less, which by common law the holders of shares in a corporation have.

There existed at that time in Missouri certain laws affecting corporations. One of these gave to the legislature power to alter, suspend or repeal the charter of any corporation. Another created a double liability on the part of stockholders, and provided means for enforcing this liability. These laws were repealed, so far as the Excelsior Insurance company was concerned, and thus the duties and liabilities of the stockholders were left as at common law.

So far, then, as the stockholders were concerned, what was the contract contained in the act of 1859? It simply left their rights, duties and liabilities as at common law. It would seem, therefore, that the act of 1859, so far as it constituted a contract, was a contract between the State and the corporation only, and not between the State and the individual stockholders. No provision can be pointed out which in terms applies to stockholders, or which in express terms constitutes a contract with the stockholders, except that this stock shall be personal property and shall be transferable on the books of the company (Mo. Laws, 1856–7, p. 546). Counsel for plaintiff in error have not pointed out any provision from which any implied contract can be raised in favor of the stockholders.

Does section 736 of the Revised Statutes of 1879, under which this proceeding was instituted, impair any obligation of the contract with the corporation? That contract is that the corporation created by the act of 1859 should (1) have succession for the period limited in its charter; (2) sue and be sued in all courts; (3) have a seal; (4) hold and convey real estate; (5) appoint officers and agents; (6) make by-laws not inconsistent with existing laws for the management of its property, the regulation of its affairs, and the transfer of its stock. (Rev. Stat. 1855, chap. 34, § 1); and (7) make all kind of insurance specified in sect.

7 of the charter of the Washington Insurance Co. (Mo. Laws 1856–7, p. 545).

It is not pretended that Section 736 impairs the obligation of this agreement in any of the above particulars. The corporation is not here complaining that its contract has been impaired. No time need be consumed, therefore, in arguing that, so far, no violation of the constitutional provision as to the obligation of contracts has been shown.

The second contract involved in this discussion is that which the plaintiff in error entered into when he subscribed for his stock. The parties to that contract were the plaintiff in error and the corporation created by the act of 1859, namely, the Excelsior Insurance company. By this subscription plaintiff in error agreed to pay the full par value of each share of stock subscribed by him. Section one of the charter of the Washington Ins. Co., which by the act of 1859, was made the charter of the Excelsior Ins. Co., provides that the shares shall be one hundred dollars each. Section 2 provides that:—

"At the time of subscribing there shall be paid on each share one dollar, and nine dollars more within twenty days after the first election of directors; * * * the balance due on each share shall be subject to the call of the directors, and the said company shall not be authorized to make any policy or contract of insurance until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand by approved notes or mortgages of real estate." (Mo. Laws 1856-7, p. 544).

This obligation to pay the full amount of the shares subscribed by him is one which the plaintiff in error can get rid of only by actual payment, and one from which the corporation has no power to discharge him. *Sawyer* v. *Hoag*, 17 Wall. 610.

It is difficult to believe that any one can seriously contend that section 736 impairs any obligation contained in this contract. That section furnishes a method of enforcing

the obligation. And it is a new doctrine that a statute which furnishes a remedy for a breach of contract impairs the obligation of such contract.

Suppose there had been at the time this subscription was made, no specific method of enforcing the subscriber's obligation. Would counsel contend that a law which did prescribe a specific method would be unconstitutional? Yet he contends that a change in the method is a violation of the constitutional right. In other words, while he admits that he has not performed his obligation, he complains because the legislature has made it easier to compel him to perform it than it was when he subscribed.

In this, by the way, he is mistaken, as a matter of fact. The law as it is found in section 736 was in force in 1866, when he subscribed for his stock. The method of enforcing his liability has never been changed since he subscribed, except by way of diminishing the liability of a stockholder, *i.e.*, by striking out the double liability. Section 736 became a law March 19, 1866 (see opinion of Mo. Supreme Court, 86 Mo. 472; Laws of Mo. 1865–6, pp. 20–70), and plaintiff in error did not subscribe for his stock until July of that year. (Printed record, p. 6.) So that it is not even true, as a matter of fact, that the method of enforcing his obligation has been changed since the obligation was incurred. And so the Missouri Supreme Court held in this case (86 Mo. 472). That his liability was governed by the law in force at the time he subscribed is also decided in *Fairchild* v. *Hunt*, 71 Mo. 526.

But if it were shown that the method of enforcing the obligation had been changed since the subscription, plaintiff in error would be no better off. The federal constitution does not inhibit a change of remedy.

Bronson v. *Kinzie*, 1 How. 316.

The position taken by plaintiff in error is that in the absence of a statutory remedy, a creditor must resort to his

bill in equity; that in equity the creditor must sue in behalf of all the creditors who wish to join, and all the stockholders must be made parties; that, as a necessary result of these premises, a statute which gives to one creditor a remedy against any single stockholder, whereby he may compel such stockholder to pay the full amount of his indebtedness to the corporation, without regard to what others may owe, is such a change of remedy as to violate the constitutional provision referred to. But counsel is mistaken in his premises. Whatever may be the rule when a liability additional to the full par value of the shares is sought to be enforced, the rule, as stated by plaintiff in error, does not apply to cases where the object is to enforce payment of a balance due on the original subscription. And this is true whether the proceeding be in equity or at law.

This point is settled by the case of *Hatch* v. *Dana* (101 U. S. 205), decided in 1879, from the opinion in which case I will make a brief extract: —

"The liability of a subscriber to the capital stock of a company," says Mr. Justice Strong, "is several and not joint. By his subscription, each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers; and in equity his liability does not cease to be several. A creditors' bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties, that complete justice may be done by equalizing the burdens, and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is, that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not

the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes."

The cases cited in the opinion fully sustain the conclusion of the court, if authority were necessary.

Plaintiff in error insists that the balance of his stock was only to be paid as called by the Board of Directors, and that as no call was made, nothing is due from him to the corporation. As this point is not involved in the constitutional question, it does not properly come before this court. If it did, it is sufficiently answered in *Sawyer* v. *Hoag*, 17 Wall. 610, and in *Hatch* v. *Dana* (*supra*), in both which cases the point is decided against the plaintiff in error. In *Sagory* v. *Dubois* (3 Sandf. Ch. 466), it is held that the contract of subscription is to pay the shares in full, though they were payable in installments as called for by the directors. In that case the directors had passed a resolution that no installment beyond fifty per cent., which had been paid in, should ever be called for; yet the shareholder was held liable for the balance, and it was further held that an action would lie against a single stockholder to compel him to pay in full, since this was only compelling him to pay his own debt to the association.

See also *Ogilvie* v. *Ins. Co.*, 22 How. 387.

There is no such thing as a vested right to a particular remedy.

Springfield v. *Commissioners*, 6 Pick. 508;
People v. *Tweed*, 5 Hun, 392.

And the legislature may always alter the form of administering right and justice. See cases above cited; also

Terry v. *Anderson*, 95 U. S. 633;
McElrath v. *Railroad Co.*, 55 Pa. St. 189, 204;
Story on Const., (4th ed.), § 1385; especially note 3 on page 245, and notes 2 and 3 on succeeding page.

The very point that plaintiff in error urges, that he has a vested right to an equitable mode of procedure, has been decided against him by this court in *Ogilvie* v. *Insurance Co.*, 22 How. 391.

And as this court says in a later case, the object of the constitutional provision is to protect *rights*, not merely *incidental advantages* which may affect the contract indirectly.

Ochiltree v. *Railroad Co.*, 21 Wall. 253.

Nor can it be said that the remedy now given is the same as that which existed in 1855, and which was repealed by the charter of the Excelsior. A comparison of sections 13-17, pages 372-3, of the Revised Statutes of 1885 with section 736 of the revision of 1879, will show that the object of the two laws is different, and the methods of procedure different.

I respectfully ask an affirmance of the judgment.

EVERETT W. PATTISON,
Attorney for Defendant in Error.

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IN THE

Supreme Court of the United States.

BRITTON A. HILL'S EXECUTOR,
PLAINTIFF,
vs.
THE MERCHANTS' MUTUAL INSURANCE COMPANY,
DEFENDANT.

No. 215.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Supplemental Brief by Defendant in Error in Reply to Brief of Plaintiff in Error.

Counsel for defendant in error, having filed his brief before having received the brief of plaintiff in error, desires now to call attention to one or two of the points made by plaintiff in error.

Plaintiff in error studiously endeavors to keep out of sight the main purpose, if not the only purpose, which was intended to be accomplished by the enactment of sections

13 and 14, contained in the Revision of 1855. The purpose of those sections, was, primarily, to impose upon stockholders a double liability; and, secondarily, to provide a method for enforcing that double liability. It is, to say the least, extremely doubtful whether the liability of the stockholder for any unpaid balance of his original subscription could be enforced under the provisions of sections 13 and 14. The main purpose of this enactment having been to impose a double liability upon stockholders, it follows that the principal object in exempting the stockholders of the Excelsior Insurance Company from the operation of those sections was to exempt them from a double liability. Such double liability has never been imposed upon plaintiff in error, and it was not sought by the proceedings in this case in the State court to impose upon him any such liability. We sought to hold him only for what he contracted to pay, and the remedy by which we sought to enforce his contract was one totally different from that provided in 1855 for enforcing the double liability of stockholders.

So different are the methods of procedure under the two acts that, even if it had been the main purpose of the Excelsior Insurance Company's charter to exempt its members from the method of procedure provided in section 14 of the Statutes of 1855, the present act, the one under which this proceeding was commenced, can in no sense be held to be in derogation of such exemption. A mere reading of the two acts side by side will make this as clear as could the most extended argument. Section 14 provided that an officer holding an execution might levy upon the property of the stockholder in the same manner as if the execution were against him individually, without any judicial ascertainment of his liability, without giving him any opportunity to be heard, with no opportunity for defense. The only right granted him in the matter was that he should have forty-eight hours notice of the Sheriff's intention to

make the levy, that he might, if possible, during that time point out to the officer corporate property which was subject to execution. Compare with this summary and extremely onerous provision the language of section 736 of the Statutes of 1879, under which this proceeding was had. By the latter section, no execution can issue against a stockholder except it be ordered by the Court. The Court can make the order only after motion made in open Court, and of that motion the stockholder sought to be charged must have ample notice in writing. A hearing is had; the liability of the stockholder is judicially ascertained; the Court then enters its decree; and only after these proceedings can execution run against the stockholder. To say that the provision of the Insurance Company's charter exempted its stockholders from this method of procedure, is to say that it was out of the power of the legislature to provide any special method whatever for enforcing the liability of those stockholders.

Nor does it help the case of plaintiff in error at all, to call this section 736 an "amendment" of the provision contained in the revision of 1855. The act of 1855 was an amendment of the former act only in the sense that any subsequent law is an amendment of laws previously existing. Neither does the fact that the marginal note in the revision of 1855 calls it an amendment affect the question. The marginal note is no part of the law.

The Act approved March 10, 1866 (Acts 1866, p. 20), will be searched in vain to find any indication that it is an amendment to any prior act. The word "amended" is not used. It does not purport to be an amendment. It is a separate and independent act, and repeals by implication everything inconsistent with it contained in former acts.

I find myself unable to understand just what counsel means when he claims that the Act of 1866 (Section 736 of

the Revision of 1879) is "retroactive" as to plaintiff in error. The law existed when he subscribed for his stock. It imposed no liability upon any stockholder of the Excelsior Insurance Co., whether he was a subscriber before or after its passage, that did not exist and does not exist independently of that section. His idea seems to be, that because it is, as he asserts, an amendment to the act which was in force when the charter of the insurance company was granted, that it therefore relates to that date. But if it be granted that it is an amendment, I know of no principle of law which by relation gives force to an amendment as of the date of the act amended. Even if it did, I think that I have already shown that any law changing the remedy cannot be considered a retroactive law.

All other points have been fully covered in my original brief.

EVERETT W. PATTISON,
Attorney for Defendant in Error.